

THE LAW OF THE SEA:  
THE UNITED STATES, CANADA  
AND THE DEEP SEABED

by

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## FOREWORD

The international political, legal, and organizational processes involved in the development of the law of the sea provide a model for understanding or predicting the formulation of international law. Whether applying theories of international relations or systematically examining specific issues, the law of the sea clearly demonstrates the inherent relationship between national interests, the international political climate, scientific and technological discoveries, and the development of international law.

Prior to the Twentieth Century, national interests in the sea were primarily limited to navigation and living resource extraction. The development of the law of the sea was, therefore, influenced by the freedom of the seas doctrine, which provides that states and individuals enjoy free, equal, and unimpeded access to the sea, and the individual actions of states. With the discovery of seabed minerals and the concomitant development of exploitation technology, however, the focus of national interests shifted from the sea to the seabed.

Extending over more than three hundred and sixty million square miles of the earth, the seabed is a vast reservoir of mineral resources. Although the scientific community uncovered the seabed's enormous wealth over a century ago, the seabed did not acquire an economic value until the development of exploitation technology in the early 1960s. Alerted to the economic potential of exploiting the mineral resources of the seabed, states began to view the sea as a resource of tremendous economic importance. The resultant conflict over access to, and ownership of, this newfound resource challenged the established law of the sea. As a consequence, the international community has dedicated the past twenty-five years to the development of a new law of the sea which reconciles conflicting national interests in the conventional uses of the sea with the economic potentialities of mining the seabed.

Although the international community established a new law of the sea convention in 1982, deep divisions over the convention's deep seabed mining provisions militate against it ever entering into force. Fuelled by the technology exigences of deep seabed mining, the central issues in the conflict are national economic, national sovereignty, and national strategic interests. As a result,

traditional alliances have been broken. States are bound together by national interests, not geography or political ideology.

There is no better example of this fact than the alliance of the United States and Canada. The pursuit of different and often conflicting goals in the development of a new law of the sea precipitated a conflict of interests between the United States and Canada. Since one state could not achieve its objectives without undermining the objectives of the other, the traditional alliance was broken. The severance of this alliance demonstrates the central role that national interests play in international relations. Once it is understood how conflicting national interests could divide the world's two foremost allies, it becomes possible to understand not only how but why the development of international law can divide the international community in general.

This, then, is my thesis: What are the economic potentialities of deep seabed mining? What are the national interests of the United States and Canada in the development of a new law of the sea? What were their law of the sea goals and, therefore, their objectives in the law of the sea negotiations? The answers to these questions will be provided through a systematic examination of the



law of the sea issues specifically related to the deep seabed. Following this examination, conclusions will be drawn as to whether or not the United States and Canada achieved their goals and, thereby, protected their national interests. Based on the conclusions drawn, predictions will be offered on the possibility of the 1982 Law of the Sea Convention entering into force.

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## I

## INTRODUCTION

Though not in force, the 1982 Law of the Sea Convention is having a stabilizing effect on national policies governing the area of the sea and the seabed under national jurisdiction. After more than half a century of conflict between coastal and maritime states, consensus on the width of the territorial sea and coastal state sovereignty over offshore resources appears to have been achieved. Prior to 1982, coastal states were claiming territorial seas of anywhere from three to two hundred and fifty miles. Now, only eighteen states claim a territorial sea exceeding twelve miles.<sup>1</sup> More than one hundred states have established twelve-mile territorial seas and seventy-nine states have legislated two hundred mile exclusive economic zones (EEZ).<sup>2</sup> In line with these developments, the United States adopted a two hundred mile EEZ in 1983 and extended its territorial sea to twelve miles in 1988. On September 23, 1989, the United States joined with the Soviet Union in issuing a statement which declares *inter alia* that their governments are guided by the provisions of the 1982 Law of the Sea

Convention with respect to the traditional uses of the sea.<sup>3</sup> With the endorsement of the world's foremost maritime powers, the twelve-mile territorial sea and the two-hundred mile EEZ have now passed into customary international law.

Unfortunately, a similar consensus has not been achieved on the Convention's deep seabed mining provisions. After more than twenty years of negotiations there is still no agreement in sight. At the centre of the dispute is the issue of whether the deep seabed mining industry should be governed by the free market system or by a powerful international regime. Though knowledge of the seabed's massive mineral wealth has existed for more than a century, it did not become the subject of intense international debate until the early 1960s when the development of technology opened up the prospects for exploitation.<sup>4</sup> With the development of exploitation technology, the seabed suddenly became an important future source of mineral supplies. At the same time, however, this dramatic increase in the value of the seabed and its resources rendered the existing law of the sea inadequate.

The development of seabed technology had surpassed the development of international law. There was no international regime

to prevent the escalation of national conflicts and rivalries instigated by seabed technology and the economic potentialities of exploiting seabed mineral resources.<sup>5</sup> The United Nations responded in 1966. Under Resolution 2172, the General Assembly requested that the United Nations, in cooperation with its agencies and interested member states, undertake a comprehensive survey of activities in marine science and technology, including mineral resources, and formulate proposals with regard to the exploitation and development of marine resources.<sup>6</sup>

Resolution 2172 led to the creation of the Expanded Program for Ocean Exploration. Following a comprehensive survey, the Expanded Program for Ocean Exploration concluded that the seabed contains more petroleum and mineral resources than have ever been exploited by man and, unlike land-based resources, they are renewable.<sup>7</sup> In addition to massive petroleum reserves, the seabed contains large placer deposits of gold, iron, titanium, diamonds and other industrial minerals. Manganese nodules were found extensively in the Atlantic, Pacific and Indian Oceans. Containing higher admixtures of cobalt, nickel, manganese, and copper than similar nodules found in shallower waters<sup>8</sup>, these nodules were estimated

at approximately three billion tons in the mid-1960s. This figure was adjusted to fifteen billion tons in the mid-1980s.<sup>9</sup> According to German scientists, seabed nodules contain fifteen times more copper, fifteen thousand times more nickel, and four hundred times more manganese than all land subsoils.<sup>10</sup> At the 1960 rate of consumption, it was estimated that these deposits could meet four hundred thousand years of world manganese consumption, one hundred and fifty thousand years of world nickel consumption, and six thousand years of world copper consumption.<sup>11</sup>

Although potentially limitless, mineral resources are not evenly distributed throughout the deep seabed. Most deposits are located within two hundred miles of the coastline. The continental margin including the shelf, the slope and the rise, contains the greatest part of the potential sub-sea resources likely to be recovered within the next several decades.<sup>12</sup> As of 1967, deposits of two hundred billion tons of oil had been located in the continental shelf alone.<sup>13</sup> Offshore wells located within one hundred and twenty kilometres of the coast accounted for twelve percent of the United States' oil production and eight percent of world production.<sup>14</sup>

While substantially smaller numbers of minerals are located in

the large ocean basins, the total amount is extensive. By the late 1960s, scientific research had only obtained definite knowledge of a few hundred sites in four exploitable nodule zones which together comprise a very small part of the deep seabed.<sup>15</sup> Because of the massive economic rent of recovery and processing, it is estimated that only a small percentage of deep seabed minerals are ever likely to be recoverable.<sup>16</sup> Nonetheless, the economic implications of deep seabed mining are startling. Land-based mineral producers estimate that at medium levels of output, a single firm could reduce the world market prices of manganese from \$.90 to \$.50 per unit, cobalt from \$1.50 to \$1.00 per pound, and nickel from \$.70 to \$.65 per pound.<sup>17</sup>

On August 17, 1970, stimulated by the economic potential of exploiting the seabed's mineral resources, Arvid Pardo, Malta's Ambassador to the United Nations, proposed that the agenda of the Twenty-Second Session of the General Assembly include "the examination of the question of the reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil underlying the high seas beyond the limits of present national jurisdiction and the use of the resources in the interests of



mankind."<sup>18</sup> In a dramatic three and one-half hour speech Pardo appealed to the United Nations to establish an international regime to govern the seabed. Claiming that, if internationalized, the income from exploiting the mineral resources of the seabed could return five billion dollars to the United Nations' treasury by 1975,<sup>19</sup> Pardo proposed that a new law of the sea treaty be drafted. As envisaged by Pardo, the new treaty would prevent the national appropriation of the seabed, restrict the definition of the continental shelf, and use seabed assets primarily to benefit the developing nations.<sup>20</sup>

Pardo's estimation of the value of the seabed's wealth appears to have been based on the amount of manganese nodules found in the deep seabed. He must not have taken into account the fact that seabed minerals are of a much lower-grade and are, therefore, less valuable than land-based minerals; that seabed minerals are much costlier and riskier to mine than land-based minerals; that the efficiency and reliability of deep seabed mining technology has not been proven; and, that only a very small amount, perhaps less than ten percent, of deep seabed minerals will ever be exploited. More importantly, Pardo failed to note that his calculations were based on the assumption that almost the entire seabed would be

designated the common heritage of mankind. In 1967, the legal limit of coastal state sovereignty was three miles from the coastline. Coastal state jurisdiction was limited to the mineral resources of the continental shelf. As proposed by Pardo, then, the entire continental shelf and high seas beyond the three mile territorial sea limit would belong to the international area. When the value of the continental shelf resources are included in Pardo's estimates, the discrepancy between the deep seabed's real wealth and Pardo's estimated wealth is explained. Pardo's failure to clarify this fact led the General Assembly, particularly the developing nations, to over-estimate the economic potential of exploiting the deep seabed. Since the common heritage of mankind principle appealed to the economic interests of the poorer nations, it was overwhelmingly endorsed by the developing nations. As a result, the Twenty-Fifth Session of the General Assembly declared the ocean's deep seabed the common heritage of mankind to be governed by an international regime. The declaration led to the establishment of the Permanent Seabed Committee, the Third United Nations Conference on The Law of the Sea (UNCLOS III), and the Law of the Sea Preparatory Commission (PrepCom). Directed to draft treaty articles and a

comprehensive list of items for negotiations at UNCLOS III, the Permanent Seabed Committee assembled six times between 1970 and 1973. From December 1973 to September 1982, UNCLOS III held eleven negotiating sessions for the purpose of producing a new law of the sea treaty of universal character. At the conclusion of UNCLOS III, the PrepCom was created to implement the deep seabed mining provisions of the 1982 Law of the Sea Convention.

Creation of new international law naturally challenged the conventional uses of the sea and, therefore, established national seabed policies. Thus, negotiation of a new law of the sea treaty gave rise to two related issues. First, what part of the seabed should be designated the international area and how should that designated area be defined; and second, who would exploit the deep seabed resources in the international area and how should that exploitation take place? To obtain an accommodation between the numerous and conflicting interests evoked by these twin issues, two new concepts which departed drastically from established international law were put forward.<sup>21</sup> To address the issue of defining the outer limits of the international area, the first concept was the establishment of a two-hundred mile exclusive economic

zone (EEZ). Coastal states would enjoy exclusive jurisdiction over the resources in the EEZ while the seabed beyond this point would be designated the international area. The second concept was the creation of an international regime to govern deep seabed activities in the international area.

Rather than conflict resolution, the two concepts inspired an intense international debate. Whereas the 200-mile EEZ was considered necessary if states endowed with little or no continental margins were to be fairly treated,<sup>22</sup> implementation required coastal states with broad continental margins to magnanimously renounce national jurisdiction over all resources beyond the 200-mile limit. Although the majority of coastal states endorsed the common heritage of mankind in principle, they were not prepared to sacrifice their national economic interests in order to attain this ideal.

Achieving consensus on how to implement the international regime was equally problematic. A conflict of interest developed between three principal groups--industrialized and mineral consuming states, developing states, and land-based mineral exporting states. The industrialized and mineral consuming states,

while willing to share with the international community revenues derived from mining the international area, were concerned with securing unimpeded access to the minerals of the deep seabed.<sup>23</sup> Developing states, in pursuit of a new world economic order, insisted that the international area and its resources be developed primarily for the benefit of the poorer nations. In effect, these states saw the development of deep seabed mining as the vehicle through which technology and capital could be transferred from the developed to the developing nations. While the developing mineral exporting states were ideologically aligned with the developing states, the industrialized mineral exporters shared interests with both groups. On the one hand, as industrialized states, they sought the right to participate in the development of the deep seabed mining industry. On the other hand, as mineral exporting states, they were intent on preventing a disruption in the marketing of their land-based mineral production. Because of the inability of these groups to achieve a balance of interests, negotiations deadlocked.

The deadlock's impact on the creation of a new international law of the sea was twofold. First, the negotiations became an ongoing process of indeterminate length. The commitment of more

than six years to preparations and eight years to negotiations transformed UNCLOS III from a conference for the progressive development of international law into a process of codification. Second, although UNCLOS III succeeded in producing the 1982 Law of the Sea Convention, many of the Convention's deep seabed mining provisions have been eroded by time. The failure of negotiations to stay ahead of, or at least to keep pace with, advances in seabed research and technology undermined the PrepCom. Mandated to implement the Convention's deep seabed mining provisions, the PrepCom is now attempting to implement policies which, because of the passage of time, are obsolete.

Of the one hundred and fifty-eight states participating in the law of the sea negotiations none were more active nor more influential than the United States and Canada. Two of the eleven draft seabed treaty proposals submitted to the Permanent Seabed Committee were tabled by the United States and Canada. Many of the proposals presented by the United States and Canada either strongly influenced, or were actually incorporated into, the 1982 Law of the Sea Convention. As well, most of the contentious issues dividing the PrepCom were foreseen by the United States and Canada at

UNCLOS III. Consequently, an examination of the United States' and Canada's interests in the deep seabed will serve to explain their conflicting goals at UNCLOS III, why the 1982 Law of the Sea Convention has not entered into force, and why the PrepCom will ultimately fail to achieve its mandate.

With December 1991, the date targeted by the PrepCom for completion of its mandate, fast approaching, the time is appropriate for such an examination. This thesis, therefore, asks several fundamental questions. What were the United States' and Canada's interests in the development of a new law of the sea? What were their interests in deep seabed mining? What were their law of the sea goals? What objectives did they pursue in the law of the sea negotiations, and what were their actual achievements? The answers to these questions are sought through an examination of the United States' and Canada's positions on two related issues, specifically, which part of the seabed should be designated the international area and how should that designated area be defined; and, who should exploit the deep seabed resources in the international area and how should that exploitation take place? Naturally, this examination necessitates an answer to the further

question of where the United States and Canada stood on the concepts of a two hundred-mile EEZ and the establishment of an international regime to govern the international area? Since the protracted negotiating process is directly related to the stagnating ratification process, one final question also arises. What effect has the prolonged process had on the United States' and Canada's attainment of their law of the sea goals?

For clarity, this thesis begins with a brief history of seabed politics; identifies the United States' and Canada's national oceans policies and law of the sea goals; and examines their objectives in the law of the sea negotiations. In conclusion, this thesis will demonstrate that the United States was substantially more successful than Canada in the attainment of its law of the sea goals.



## II

## THE DEEP SEABED

Historically, there is no evidence that an international law was ever established to divide the sea into different zones governed by different rules and regulations. It was the natural propensity of coastal states to extend their national jurisdictions as far out to sea as possible that led to the legal division of the sea into zones. The first division was the territorial sea, the second was the continental shelf, and the third was the deep seabed. After years of unilateral coastal state claims to jurisdiction over the coastal waters adjacent to their coastlines, the three-mile territorial sea passed into customary international law at the end of the Nineteenth Century. With the three-mile territorial sea entrenched in international law, the sea was legally divided into two zones--the territorial sea and the high seas. Under international law, the coastal state enjoys exclusive jurisdiction over the waters, subsoil, seabed, resources, and airspace within the territorial sea. While foreign-owned ships enjoy the right of innocent passage through the territorial sea, overflight by foreign aircraft of the same [ship-

owning] state is contingent upon coastal state approval. Traditionally, everything beyond the three-mile territorial sea was designated the high seas. Under the freedom of the seas doctrine, all states and persons have equal rights of free and open access to the high seas and high seas resources.

The trend towards seabed claims began in the early 1940s with the discovery of seabed oil deposits and the development of exploitation technology. In 1942, under the Treaty of Paris, Britain and Venezuela unilaterally divided the seabed in the Gulf of Paria between Venezuela and Trinidad. While the intent of the initiative was to resolve a jurisdictional dispute over seabed oil, it precipitated the division of the sea into a third zone--the continental shelf. Within three years, the United States unilaterally extended its national jurisdiction over the mineral resources of the continental shelf. In 1945, the United States issued the Truman Proclamation which declared United States jurisdiction over the natural resources of the subsoil and seabed of the continental shelf. Unlike the Britain-Venezuela agreement, however, the Truman Proclamation assiduously avoided defining the outer limits of the shelf and laying claim to the sea or seabed. As a foremost maritime

state, highly dependent upon the freedom of the seas doctrine, the United States ensured that the Truman Proclamation was carefully worded. The Proclamation, therefore, claimed United States' jurisdiction over the mineral resources of the continental shelf while clearly specifying that "the character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected"<sup>24</sup>

Despite its careful wording, the Truman Proclamation triggered an extension of the territorial sea to the superjacent waters of the continental shelf. Within one month, Latin American states began claiming territorial seas and/or coastal state sovereignty over the epicontinental sea to distances of two hundred miles or more from their coasts. By 1952, Brazil, Chile, Ecuador, Mexico, Panama, and Peru claimed sovereignty over the continental shelf, the seabed, the subsoil, and the superjacent waters. In effect, they closed-off the entire area of the sea adjacent to their coasts out to a distance of two hundred miles. While unilateral claims enabled the Latin American coastal states to protect their off-shore fishing industry from foreign-owned fishing fleets, they were, nonetheless, a violation of international law. As a result, a major dispute erupted

between the coastal and the maritime states.

At the heart of the dispute was freedom of navigation on the high seas. An extension of the territorial sea beyond the three-mile limit not only reduces the area of the high seas, it places a large number of international straits under the jurisdiction of coastal states. According to a United States' survey, a general extension of the territorial sea from three to twelve miles affects one hundred and sixteen international straits. More importantly, from the perspective of the United States, eighteen straits would fall under the sovereignty of states most likely to claim the right to terminate or interfere with the transit of American warships and aircraft.<sup>25</sup> A general extension of the territorial sea to six miles would result in eleven of fifty-two straits falling under the jurisdiction of states hostile to the United States' interests. Even where international straits are not affected, a general extension of the territorial sea by just one mile reduces the area of the high seas by 280,000 square miles or more.<sup>26</sup> Hence, any extension of the territorial sea, no matter how minor, results in an equal reduction of not only the area of the high seas but the freedom of navigation.

If the rules and regulations governing the territorial sea and

the high seas were the same, there would be no problem. However, this is not the case. Whereas the high seas are governed by international law, the territorial sea is governed by coastal state law. Vessels navigating the high seas enjoy freedom of navigation and are subject only to the jurisdiction of their flag or nation state. The freedom of navigation does not apply to the territorial sea, however. Vessels traversing the territorial sea only have the right to innocent passage. Submarines must navigate on the surface of the water. Aircraft have no right of innocent passage. And, in certain circumstances, such as a security threat, the coastal state can temporarily suspend the right of innocent passage for all foreign-owned vessels. Furthermore, vessels operating in the territorial sea are subject to the jurisdiction of the coastal state. While the coastal state has no prosecutorial power, it does have the authority to impound foreign-owned ships. Since the potential exists for coastal states with fundamentally different political, economic and military interests seriously to restrict the strategic and economic interests of the maritime states, the Truman Proclamation precipitated a conflict of interest between the coastal and the maritime states. The maritime states recognized the coastal states'

legitimate right to jurisdiction over the seabed and seabed resources of the continental shelf. They would not, however, extend that jurisdiction to the superjacent waters.

Motivated by the chaotic conditions which began to prevail, the United Nations intervened. In 1949, the United Nations commissioned the International Law Commission (ILC) to codify a law of the sea. Following the tabling of the ILC's recommendations in 1956, the United Nations hosted the First United Nations Conference on the Law of the Sea (UNCLOS I) in 1958. As recommended by the ILC, the sea was divided into three zones--the territorial sea, the continental shelf, and the high seas. Under the provisions of the 1958 Geneva Convention on the Continental Shelf, the coastal state was granted exclusive jurisdiction over the continental shelf and the non-living resources of the shelf. For legal purposes, the continental shelf is defined as the seabed and subsoil of the submarine area adjacent to the coast but outside the area of the territorial sea to a depth of one hundred fathoms (two hundred metres, six hundred and fifty-five feet). To accommodate the existing Latin American claims and the interests of the broad-margin states, an "exploitability" clause was appended to the

Convention. The exploitability clause provides for coastal state jurisdiction beyond the one hundred fathom limit to where "the depth of the superjacent water admits of exploitation of the natural resources of the said area."<sup>27</sup>

While UNCLOS I established the Convention for measuring the breadth of the territorial sea, it was singularly unsuccessful in achieving consensus on the width of the territorial sea. Although a second conference, UNCLOS II, was convened in 1960 for the sole purpose of concluding an accord on the width of the territorial sea, it, too, ended in failure. Rather than facilitating agreement, the ILC's recommendation that the territorial sea be extended to six miles and not more than twelve miles, led to an impasse. The majority of maritime states subscribed to the six-mile limit. Coastal states were divided. While some advocated adoption of the twelve-mile limit, others sought the right to establish their own limits. For this reason, UNCLOS I failed to establish a new international law of the sea. However, with the passage of the 1958 Geneva Convention on the Continental Shelf into international law, coastal states acquired jurisdiction over the shelf and its resources. Consequently, there was a greater degree of uniformity in

the national seabed policies of the coastal states.

Since the majority of coastal states incorporated the 1958 Geneva Convention on the Continental Shelf into their national oceans policies, the Pardo initiative challenged their policies. The greatest challenge arose over the issue of where to set the boundaries for the international area. Delimitation would not only determine the precise outer limits of national jurisdiction, it would also determine the allocation of seabed resources. Although Pardo's extravagant estimate of the value of manganese nodules had stimulated the coastal states' interests, this was not their main concern. The primary seabed resource in the late 1960s was petroleum.

The key factors in exploiting the mineral resources of the seabed are technology and economics. Deep seabed mining technology had not been perfected in 1968. Manganese nodules were recoverable only at depths of thirty to sixty metres. Although there were preliminary designs for mining at depths of twelve hundred metres or more, the exploitation differentials increase rapidly with the increasing depths of water. And, since deep seabed mining was relatively untested, the estimated costs and risks were very high.



Conversely, land-based mineral reserves exist on all continents; have a superior grade than deep seabed minerals; and, are considerably easier to exploit than deep seabed minerals.\*\* The deep seabed is, therefore, an important future source of minerals when land-based reserves are depleted or no longer sufficient to meet world demand. The seabed mineral of immediate concern, then, was petroleum. Acquiring or maintaining jurisdiction over seabed petroleum reserves took precedence for coastal states. Even mineral exporting states viewed deep seabed mining as a future, not an immediate, threat to their land-based mineral industries. The issue of boundary delimitation, therefore, focused on who would have jurisdiction over the continental shelf and its resources.

By the end of 1968, the off-shore oil industry was in a rapid state of development and expansion.<sup>28</sup> Off-shore wells were producing oil from under as much as two-hundred metres of water. Estimates were that within ten years wells would be producing oil from under two thousand metres or about a mile and a quarter of water.<sup>29</sup> Over twenty countries had off-shore oil and gas production and another fifty were actively engaged in off-shore exploration.<sup>30</sup> With off-shore wells accounting for approximately eight percent of

world production, almost every coastal state had visions of off-shore petroleum wealth.<sup>31</sup>

Under the 1958 Geneva Convention on the Continental Shelf, coastal states have sovereignty over the mineral resources of the shelf. However, the establishment of an international area challenged the open ended nature of the Convention. Since a precise definition of the international area would automatically define the outer limits of coastal state jurisdiction, it would also restrict the definition of the continental shelf. The exploitability clause in the 1958 Geneva Convention on the Continental Shelf was, therefore, at risk. In effect, the common heritage of mankind principle could not be implemented without prejudice to the interests of the coastal states. Land-locked, geographically disadvantaged, and limited continental shelf states would acquire seabed rights without sacrificing their national sovereignty. However, this was not the case for coastal states. On the one hand, coastal states would be required to forego the exploitability clause in the Convention. On the other hand, depending upon where the boundary was drawn, they might be required to relinquish sovereignty over the richest area of their off-shore resources. Hence, the Pardo initiative challenged

both the sovereignty and the economic interests of coastal states.

Anticipating the division of the entire seabed at their expense, coastal states began to extend their national jurisdiction to unprecedented distances from shore. As observed by Pardo, the establishment of an international area initiated the greatest territorial annexation since the Berlin Congress. Solidifying their position within a united regional agreement, the majority of South American states uniformly and unilaterally extended their territorial seas to two hundred miles. By March 1970, all coastal states in South America, except for the northern, geographically disadvantaged states--Colombia, Guyana and Venezuela--claimed 200-mile territorial seas.

Although ideologically aligned with the South American states, the Organization of African Unity (OAU) sought a compromise position. Rather than extending the territorial sea to two hundred miles, the OAU proposed the establishment of a twelve-mile territorial sea and a two hundred-mile exclusive economic zone (EEZ). While coastal states would enjoy sovereignty over the resources in the EEZ, maritime states would have navigational rights. The OAU did not, however, support coastal state sovereignty

over the continental shelf. Unlike the South American states, Africa is a disadvantaged continent in that it lacks an extensive continental shelf. And what little continental shelf there is, is not evenly distributed among the African states. To prevent annexation of the continental shelf from increasing the territory, economic and political power of coastal states, the OAU argued that the entire continental shelf should be declared the common heritage of mankind.

Despite their continental shelf differences, the African coastal states aligned with the Central, South American, and Caribbean states. The alliance agreement provided that these states would resist any attempts to limit coastal state sovereignty at the law of the sea conference. Future negotiations would be premised upon coastal state sovereignty over all the resources within two hundred miles of the coastline or over the entire continental shelf even when it extended beyond the two hundred mile limit.

Combined, the Pardo initiative and the consequent alliance of the developing coastal states precipitated an intense conflict of interest between maritime and coastal states and industrialized and developing states. At the centre of the dispute was national oceans

policies. Conflict resolution would have a direct impact on the national oceans policies of all four groups. This was particularly true for the United States and Canada. The national oceans policy of the United States reflected both its national strategic and national economic interests. Canada's national oceans policy embodied its national sovereignty and national economic interests. Protecting their national interests necessitated that both the United States and Canada assume leadership positions in the future law of the sea conference.

## III

THE UNITED STATES  
AND  
THE SEABED

The United States is, at one and the same time, a major coastal state, the foremost military power, and a world leader in ocean technology. The national oceans policy of the United States was, therefore, far more specific in the late 1960s than either international law or the policies of most other states. By 1968 the United States' national seabed policy for exploring and exploiting the seabed was firmly established. The 1945 Truman Proclamation, the 1953 Outer Continental Shelf Lands Act, and the 1958 Geneva Convention on the Continental Shelf provided the policy framework. Under these acts, the United States claimed jurisdiction over the mineral resources in the continental shelf but not over the superjacent waters. The acts also carefully refrain from setting specific seaward limits to the depth of the water or the distance from shore of United States' jurisdiction.\*\*\* This deliberate avoidance of boundary limitations and sovereignty claims is explained by the United States' enormous oceans interests.

The coastline of the United States is over twelve thousand miles long. The United States' continental shelf is eight hundred and sixty-three thousand square nautical miles. And, these numbers increase substantially when the coastlines and continental shelves of Alaska, the Aleutian Islands, Hawaii, and Puerto Rico are included.<sup>32</sup> Substantial petroleum deposits are located in the continental shelf of the United States alone. According to 1970 estimates, recoverable petroleum resources to a depth of 200 metres were two hundred billion barrels of oil and eight hundred and fifty trillion cubic feet of natural gas.<sup>33</sup> Along with Lake Maracaibo in Venezuela and the Persian Gulf, the continental shelf off the coast of Louisiana accounts for sixty-three percent of off-shore oil production.<sup>34</sup> By 1968, Louisiana continental shelf oil leases were generating over five hundred million dollars in bonuses.<sup>35</sup> At the same time, oil exploration and exploitation licences were being issued to distances of forty miles off the coast of California (Forty Mile Banks) and to depths of two thousand feet.<sup>36</sup> As well, the United States Department of the Interior realized over two billion dollars in revenues from the issuance of licences to explore and exploit off-shore oil reserves.<sup>37</sup> Understandably, the Department of

the Interior strongly advocated that the United States extend its off-shore jurisdiction over the entire continental margin, shelf, slope and rise.<sup>38</sup>

Complying with the Department of the Interior's wishes, however, was not in the best interest of the United States at that time. The United States' interest in off-shore petroleum is not confined to national coastal waters. The off-shore petroleum reserves of other coastal states are of significant importance to the United States. With offshore oil production accounting for eight percent of American and twelve percent of world consumption, the United States petroleum industry had vested interests world-wide. Of the seventy or more coastal states engaged in off-shore petroleum exploration and exploitation, most were dependent upon American companies to develop the industry. This dependency stems from the fact that most coastal states are developing nations. As developing nations, they lack both the capital and the technology to develop their own off-shore industries.

While seabed oil activities in international and foreign-controlled waters were economically advantageous for the American oil industry as well as for the United States as a whole, they also



posed a unique problem for the United States. Since the establishment of an international area threatened the exploitability clause in the 1958 Geneva Convention on the Continental Shelf, it was in the best interest of the United States to extend its coastal state sovereignty as far out to sea as possible. However, a universal extension of coastal state sovereignty might have a detrimental impact on the American oil industry's off-shore investments. Production sites located in international waters could suddenly fall under the jurisdiction of coastal states. Such a development might lead to some coastal states nationalizing the American-owned production sites located in their newly acquired territories. There was also the possibility that some coastal states would, for political reasons, attempt to interfere with or restrict the movement of American oil tankers. This latter concern arose from the fact that a number of international straits would be absorbed by a three or more mile extension of the territorial sea. Thus, whereas the American oil industry had initially aligned with the Department of the Interior, it began to advocate limited coastal state jurisdiction.

While the United States' primary interest in seabed resources is

petroleum, it also has considerable interest in deep seabed hard mineral resources. This is because the United States is not only a major oil importer, it is also a net importer of the minerals located in the deep seabed. In fact, the United States spends over two billion dollars annually on mineral imports. In 1972, the United States imported ninety-eight percent of its manganese, ninety-two percent of its cobalt, eighty-four percent of its nickel, and nineteen percent of its copper.<sup>39</sup> To meet the tremendous domestic demand for mineral resources, the United States' hard mineral mining industry invested considerable time and capital in the development of deep seabed mining technology. By 1969, Deep Sea Ventures, an American corporation, had perfected a dredging system for recovering seabed nodules in waters from seven hundred and sixty to nine hundred and fifteen metres deep,<sup>40</sup> and was experimenting with techniques for recovering metals from seabed nodules with acceptable efficiency.<sup>41</sup> In addition to Deep Sea Ventures, a number of other American, West European, and Japanese companies were financing large-scale development projects.<sup>42</sup> Based on their advances, German scientists were predicting that deep seabed mining would be perfected within another five years.

The advantage to the United States, and the other industrialized states, from mining the deep seabed were threefold. First, it would reduce the United States' dependency on foreign-owned land reserves. This was particularly important given the propensity of developing nations to nationalize American-owned industries. Second, other nations would no longer be able to extract political or economic concessions from the United States in exchange for access to mineral resources. Third, access to seabed mineral resources would curtail the outward flow of American capital. Rather than contributing billions of dollars to the economies of other nations, American mineral expenditures would be redirected to the United States' economy. When viewed from this perspective, the establishment of an international seabed regime had significant economic implications for the United States.

However, the United States' national economic interest in the seabed is superseded by its national strategic interests. The United States is first and foremost a military power. As such, the United States' national security interests are profoundly dependent upon the freedom of the seas doctrine. With the development of surface missile ships and nuclear-powered submarines, such as the Polaris,

the strategic importance of seapower became paramount to the United States' security interests.<sup>43</sup> By 1968, the United States' links between seapower, navigational mobility and freedom had been firmly established for more than a decade. As early as 1958, Admiral Arleigh Burke observed that:

"Naval forces are more important in the missile age than ever before. Mobility is a primary capability of navies. Support of our free world allies depends upon the ability of the Navy to move, unhampered, to wherever it is needed to support American foreign policy. This is the great contribution of United States seapower toward the progress of free civilization."<sup>44</sup>

With seapower fundamental to the United States' national security policy, the Navy viewed the establishment of an international regime with alarm. The proposed international area caused coastal states to begin to extend their national sovereignty unilaterally as far out to sea as possible. In the process, large areas of the high seas, as well as a number of international straits, were transformed into territorial waters. Since the freedom of the seas doctrine does not apply in territorial waters, the navigational freedom of the United States Navy was significantly restricted. While seabed mineral resources are of considerable less importance to the Navy than they are to the mining and manufacturing sectors

they are, nonetheless, a potential future source of strategic raw materials. Therefore, free and unimpeded access is considered to be in the best interest of the United States Navy. Since the establishment of an international regime challenged the freedom of the seas doctrine, the Navy argued that it was not in the best interest of the United States.

Because of its extensive oceans interests, the United States is a microcosm of the international community. Just as the United Nations must achieve a balance between the diverse and often conflicting interests of the international community, the United States must seek a balance of interests between opposing domestic groups. For this reason, the United States' national oceans policy combines coastal state jurisdiction over the seabed with the freedom of the seas doctrine. In this way, the United States protects both its national economic and national strategic interests.

The goal of the United States, then, was to ensure that the establishment of a new international seabed regime and a new international law of the sea did not undermine the United States' national oceans policy.

The United States' interest in the development of a new

international law of the sea was twofold. First, an international law would establish the limits of coastal state jurisdiction and put an end to unilateral extensions of the territorial sea. Second, an international regime was required for the resolution of disputes precipitated by overlapping claims to deep seabed mining sites. However, if conflict resolution was achieved through the extension of coastal state jurisdiction and the establishment of a powerful supranational authority, the freedom of the seas doctrine would be undermined. Since the freedom of the seas doctrine underpins the United States' national oceans policy, defending the doctrine was essential to the United States' national economic and national strategic interests.

The development of a new international law of the sea convention was, therefore, problematic for the United States. On the one hand, the United States advocated the adoption of a convention which would secure international peace and stability. On the other hand, the United States wanted to maintain the status quo. Since the latter objective was an impossibility, the United States sought a compromise resolution. The task of the United States policymakers was to draft a proposal which achieved a balance of interests.

Ideally, the proposal would mirror the United States' national oceans policy.

IV  
CANADA  
AND  
THE SEABED

By all standards of measurement and definition, Canada is a major coastal state and a foremost mineral exporting state. The Canadian coastline is one of the five longest in the world. Canada's two million or more square nautical miles of continental margin are equal to approximately forty percent of its enormous land mass. The continental margin off Canada's north coast reaches considerable seaward distances at great depths. The east coast continental margin extends over six hundred miles seaward to depths of two hundred fathoms or more. According to research estimates, Canada's continental margin contains nine percent of the world's potential off-shore petroleum basins. The estimated resource potential of the basins is 59.6 million barrels of recoverable oil and 457.2 trillion cubic feet of recoverable gas.<sup>45</sup> When combined with Canada's land-based petroleum reserves, off-shore petroleum deposits are of significant importance to the Canadian economy. Consistent with its national economic interest,



by the late 1960s Canada was actively issuing permits for petroleum exploration and exploitation, particularly off the Canadian east coast.

As both a developed and a developing nation, Canada's off-shore petroleum concerns are twofold. First, as a developed nation, Canada possesses the technology to explore and exploit its continental shelf resources. For this reason, Canada reserves its right to develop, and control the development of, its national off-shore petroleum industry. Second, as a developing nation, Canada lacks the capital to develop the industry and the military capabilities to defend it. Consequently, Canada's off-shore resources are vulnerable to the exploration and exploitation activities of foreign-owned companies. The most fundamental problem for Canada, then, was devising a means of protecting its off-shore interests from the incursions of foreign-owned companies. From Canada's perspective, the key to national sovereignty protection is the entrenchment of coastal state jurisdiction in international law. To this end, Canada emerged on the world stage as a major advocate of coastal state rights.

At UNCLOS I in 1958 and UNCLOS II in 1960, Canada sought the

extension and the protection of coastal state jurisdiction in the establishment of a new law of the sea. While neither conference achieved consensus on the width of the territorial sea, as Canada had hoped, UNCLOS I established two conventions of particular interest to Canada. Both the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and the 1958 Geneva Convention on the Continental Shelf facilitated the extension of coastal state sovereignty. Under the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, coastal state sovereignty over the territorial sea extends to the seabed, subsoil and airspace. Article IV of the Convention, which is of particular interest to Canada, provides for the use of strait baselines for measuring the territorial sea areas where the coastline is deeply indented and cut into, and where there is a fringe of islands along the coast in its immediate vicinity. While the use of strait baselines cannot be invoked for purely economic reasons, where geographic conditions warrant, economic interests of long standing may be taken into account. Combining these provisions with the exploitability clause in the 1958 Geneva Convention on the Continental Shelf, Canada acquired a tremendous accretion of territory.

Canada's mainland coastline is not only deeply indented but, because of its island portions, it is also very irregular. Using straight baselines from headland to headland, rather than from the sinuosities of the coastline, to measure the territorial sea, therefore, substantially increases Canada's sovereignty over the continental shelf. At the same time, by employing the exploitability clause in the 1958 Geneva Convention on the Continental Shelf, Canada was able to extend its sovereignty over the continental shelf off its east coast to unprecedented limits. Because the ocean crust off the east coast of Canada is not sharply defined, it is scientifically impossible to determine the outer limits of the continental shelf. At the very least, the exploitability clause enables Canada to claim sovereignty out to a distance of six hundred miles and a depth of two hundred fathoms. With the existence of technology for exploiting petroleum at depths of fifteen hundred feet under the seabed, Canada considered the exploitability clause crucial to its national economic as well as its national sovereignty interest.

Employing the two Conventions, and unilateral action when necessary, Canada embarked on a broad margin policy in the early

1960s. At both UNCLOS I and UNCLOS II, Canada proposed the adoption of a six-mile territorial sea and a six-mile contiguous zone. Undaunted by the Conferences' rejection of this and other proposals, Canada turned to multilateralism. Following the close of UNCLOS II, Canada aligned with Australia and Britain in an attempt to entrench the six plus six formula in a multilateral treaty. By 1962, forty-four of the fifty-four states that supported the formula at UNCLOS II agreed to sign the multilateral treaty provided that the major powers participated.<sup>46</sup> Even though the United States had co-sponsored the six plus six formula at UNCLOS II, it declined to participate in the multilateral treaty. The United States believed that an international accord was necessary to prevent the individual practice of states from, in time, leading to the establishment of a twelve-mile territorial sea.<sup>47</sup> The United States was, therefore, concerned that the multilateral treaty would provoke a rush of unilateral claims by those states not party to the treaty. For this reason, the United States insisted that unless an international accord was achieved, the three-mile territorial sea limit would remain in force. The United States' position was ironclad. In fact, at the end of UNCLOS II, the United States statement declared that the

nonacceptance of their proposal left the preexisting situation intact and there was "no obligation on the part of states adhering to the three-mile limit to recognize claims on the part of other states to a greater breadth...on that we stand."<sup>48</sup> Nonetheless, Canada held the United States responsible for undermining the multilateral treaty and, therefore, Canada's national sovereignty interests.

Unable to achieve its national sovereignty interests through either internationalism or multilateralism, Canada resorted to unilateralism. In 1964, Canada legislated a nine-mile contiguous fishing zone parallel to its three-mile territorial sea. Canada justified its action on the grounds that it was necessary to prevent the depletion of Canada's east coast fishery by foreign-owned fleets. Although a valid argument, the fishery industry accounts for less than one percent of Canada's GNP. In reality, Canada's unilateral action was motivated by national sovereignty interests. Legislating a nine-mile contiguous zone and using straight baselines for measurement enabled Canada to extend its coastal state jurisdiction while still adhering to the three-mile territorial sea limit. Not surprisingly, then, in 1967 Canada employed straight baselines to measure the territorial sea and the contiguous zone along the coast

of Labrador and the southern and eastern coasts of Newfoundland. Since the 1958 Geneva Convention on the Continental Shelf provides that the continental shelf begins at the outer edge of the territorial sea, the use of straight baselines not only enabled Canada to extend its territorial jurisdiction, it enabled Canada to absorb a large part of the continental shelf into the territorial sea.

With the contiguous zone and the use of straight baselines firmly entrenched in Canada's national oceans policy, Canada once again resorted to unilateral action. In 1970, Canada unilaterally declared a twelve-mile territorial sea. The motivation behind the legislation was threefold. First, a number of developing coastal states, particularly African, and Central and South American states, were already claiming territorial seas from twelve to two hundred and fifty miles wide. Second, Canada, along with these other coastal states, was sending a message to the Permanent Seabed Committee and the Law of the Sea Conference that the three-mile territorial sea was no longer acceptable. Third, and most importantly, the adoption of a twelve-mile territorial sea was essential for the protection of Canada's Arctic sovereignty interests.

Although a matter of historic concern, the perceived need to

protect Canada's sovereignty over the archipelagic waters of the Arctic increased in the 1960s. The provocation came from the scientific discovery that the seabed and subsoil of the Arctic, particularly the Canadian Arctic basin, is one continuous continental shelf with massive petroleum deposits. Exploiting the huge petroleum deposits off the north coast of Alaska, however, posed a transportation problem for the United States' oil industry. The industry would have to build a pipeline or transport the oil by tanker. In 1969, the industry announced plans to test the feasibility of transporting oil by tanker from Alaska to the eastern coast of the United States. The test involved the voyage of the American oil tanker, the *Manhattan*, through the Northwest Passage. Canada, however, claims that the Northwest Passage is an internal waterway. Arguing that the *Manhattan* voyage was a violation of Canadian sovereignty, Canada lodged a diplomatic protest with the United States. Since the United States does not recognize, nor do a number of other states, Canada's Arctic sovereignty claims, it rejected the protest. Maintaining that the archipelagic waters of the Arctic are international, not internal, the United States proceeded with the *Manhattan* voyage as planned.

While the dispute focused on the issue of transit rights or freedom of navigation, the central issue was jurisdiction over seabed resources. Under the Territorial Lands Act of 1968, Canada claims jurisdiction over the licensing, regulation, and management of all mineral and petroleum exploration and exploitation in the mainland Arctic and sub-Arctic. The future exploration and exploitation of the petroleum and hard mineral resources of the Arctic seabed is, therefore, fundamental to Canada's national oceans policy. If the Northwest Passage was designated an international strait then not only the water but the seabed would be governed by the freedom of the seas doctrine. This raised the spectre of Americans, not Canadians, exploring and exploiting the Arctic's seabed resources. It was, therefore, essential that Canada take steps to establish sovereignty. Legislating a twelve-mile territorial sea enabled Canada to close off The Barrow and Prince of Wales Straits, the gateways to the Northwest Passage. However, the Northwest Passage was not absorbed by the nine-mile extension. Canada, therefore, skilfully linked environmental protection with national security interests. Citing the dramatic increase in oil tanker accidents, Canada claimed that there was a profound need to



protect the Arctic's fragile ecosystem. According to the argument, oil tankers navigating in coastal waters pose as great a threat to a coastal state's national security as do warships. Ergo, environmental protection is an essential aspect of national security.

To protect the Arctic's fragile ecosystem from the threat of oil pollution and other contaminants, Canada legislated the 1970 Arctic Waters Pollution Prevention Act. The Act establishes a one hundred nautical mile pollution prevention zone and provides for Canadian jurisdiction over the environmental function of the entire Arctic area. While not directly asserting sovereignty, the Act declares Canadian statutory authority. Under the Act, all aspects of petroleum exploration and exploitation, including pollution prevention in the Arctic seabed and the entire continental shelf, are under Canada's jurisdiction. A concurrent amendment to the Canada Shipping Act established broad powers to set ship standards for all vessels navigating in Canadian Arctic and coastal waters as well as enforcement and regulatory powers. Since the Amendment was a direct violation of international law, Canada also amended its acceptance of the International Court of Justice's (ICJ) jurisdiction. The amendment provides that all disputes relating to the prevention

and control of pollution, conservation and exploitation of the living resources in the maritime areas adjacent to the coast of Canada will no longer be justiciable before the international court.<sup>49</sup>

The ingeniousness of the Arctic Waters Pollution Prevention Act and the related legislation cannot be underestimated. In one fell swoop Canada avoided national appropriation and achieved national appropriation.<sup>50</sup> The territorial sea extension and the Arctic Waters Act enabled Canada to gain control over the archipelagic waters of the Arctic, particularly the Northwest Passage, without actually claiming that they were internal waters. In effect, Canada reinforced its jurisdiction without claiming jurisdiction. At the same time, Canada cleverly placed one hundred nautical miles of seabed outside the bounds of the international area. International reaction to the legislation was mixed. Most developing coastal states, especially the South and Central American states, aligned with Canada. The maritime states, particularly the United States and Britain, dismissed the legislation on the grounds that it was a violation of international law.

Because of geography and national strategic interests, Canada's unilateral acts had a direct impact on the national oceans policy of

the United States. In using straight baselines to measure the territorial sea and the contiguous zone, Canada changed the boundaries between the United States and Canada. A dispute, therefore, arose over overlapping claims to the sea and the seabed, particularly in the Grand Banks area of the Gulf of Maine. The dispute is over economics, not sovereignty. The Grand Banks contains one of the world's richest fisheries and continental shelves and Canada was laying claim to the richest part. While the conflict was eventually adjudicated by the ICJ, fisheries disputes continue to erupt. Although Canada's unilateral claim to a twelve-mile territorial sea was consistent with the practice of other coastal states, it was inconsistent with the United States' three-mile territorial sea as established by customary international law. By 1970, the United States was willing to accept a twelve-mile territorial sea so long as it was entrenched in an international accord. Because the United States believed that unilateral actions would undermine the achievement of an international accord, it rejected Canada's claim.

Since the Arctic Waters Pollution Prevention Act and the amendment to the Canada Shipping Act posed a direct threat to the

United States' national strategic interests, the United States' condemnation was unequivocal. If unchallenged, the Canadian legislation would give Canada the right to interfere in the national security interests of the United States. By simply invoking its right to set ship standards in Arctic and coastal waters, Canada could interfere with the navigational freedom of the United States Navy. More importantly, the legislation would establish a precedent for coastal states hostile to the interests of the United States. These states might be motivated to adopt similar legislation and then use it to impair the mobility of the United States Navy. The legislation's implications were not limited to the United States, however. Britain, France, Germany, Greece, the Soviet Union, and all states with strategic and or commercial interests in ocean navigation were equally affected by the legislation. These states, therefore, joined with the United States in declaring the legislation was in violation of international law. Canada, however, was well aware that, under existing international law, coastal state jurisdiction over pollution setting standards was limited to the three-mile territorial sea. In fact, Canada removed the legislation from the jurisdiction of the ICJ because it exceeded the limits of established international law. It

was Canada's hope that this latter action would discourage maritime challenges to the legislation. However, it didn't. The noncompliance of the maritime powers rendered the Arctic Waters Pollution Prevention Act and the amendment to the Canada Shipping Act ineffective. Unless Canada could effect a change in existing international law, its national oceans policy was unenforceable.

Internationalism, however, posed an even greater threat to Canada's national oceans policy than unilateralism. The source of the threat was the establishment of an international seabed area and an international regime to govern the area. The establishment of an international seabed area presupposes a definition of the outer-edge of the continental shelf. The exploitability clause in the 1958 Geneva Convention on the Continental Shelf would, therefore, have to be removed. So long as the exploitability clause remained in force, the international seabed area could not be defined. And, without an international area, there would be no need for an international regime. The complexity of the issue gave rise to a conflict of interest for Canada. The exploitability clause in the 1958 Geneva Convention on the Continental Shelf underpins Canada's national oceans policy. Therefore, a challenge to the exploitability clause is

an automatic challenge to Canada's national oceans policy. And, since Canada's national oceans policy enshrines its national sovereignty and national economic interests, the establishment of an international seabed area threatened to undermine those interests.

On the other hand, Canada considered the establishment of an international seabed regime essential to its national economic interests. As a foremost land-based mineral producer, Canada is more dependent on the export of natural resources than any other advanced capitalist state.<sup>51</sup> Entire Canadian communities depend upon the export of natural resources for their survival. Ranked fifth in world mineral production, Canada produces forty-one percent of world nickel, ten percent of world copper, and over seven percent of world cobalt.<sup>52</sup> Of the four principal deep seabed mineral resources, Canada is a net importer of manganese only.<sup>53</sup> Canada is, therefore, concerned that exploitation of the deep seabed will increase the world supply of minerals, particularly nickel, while decreasing the world demand for and price of Canada's land-based reserves. To prevent this development, Canada advocated regulating and limiting increases in the supply of world minerals. As a

consequence, Canada endorsed the establishment of an international regime with the mandate to regulate and limit the production of deep seabed minerals

Drafting a law of the sea proposal for Canada, therefore, required a considerable degree of ingenuity on the part of Canada's policymakers. They would have to draft a proposal which not only protected Canada's unilateral claims but which achieved a balance between Canada's conflicting interests. Like that of their American counterparts, the proposal would have to focus on limitations. First, to protect Canada's unilateral claims the proposal would have to limit the powers of the maritime states. Second, to protect Canada's sovereignty over the entire continental shelf the proposal would have to limit the boundaries of the international seabed area. Third, to protect Canada's land-based mineral exports the proposal would have to limit the production of deep seabed minerals.

While limitations were the key to success for both the United States and Canada, there was one fundamental difference. For the United States to protect its national strategic and national economic interests, the jurisdiction of both coastal states and the international regime would have to be limited. The security of

Canada's national sovereignty and national economic interests, however, rested upon its ability to limit the jurisdiction of the maritime and mineral consuming states. To a considerable extent, then, the United States and Canada were the focus of each others' limitations objectives. In effect, because of their conflicting national oceans interests, one state could not protect its national oceans policy without imposing limitations on the national oceans policy of the other.



## V

## THE PERMANENT SEABED COMMITTEE

Mandated to prepare for the establishment of the international seabed authority and the organization of UNCLOS III, the Permanent Seabed Committee held six negotiating sessions between 1970 and 1973.<sup>54</sup> Between August 1970 and October 1971, eleven states or groups of states submitted draft law of the sea proposals to the Committee.<sup>55</sup> Six proposals were from developed states and five were from developing states. In general, the developed states--Britain, Canada, France, Japan, Poland, the Soviet Union, and the United States--presented proposals which advocated the establishment of a relatively weak international seabed authority. The developing states--Malta, Tanzania, seven landlocked and geographically disadvantaged states, and fourteen Latin American states--although differing in degree, all called for the establishment of a strong international authority with fairly extensive powers. The disagreement over the nature and the power of the international authority revolved around three crucial questions. How would the international seabed area be developed?

Where would the powers of the international authority be located? Should the international authority have the power to regulate the production of deep seabed minerals?

The central problem in nearly all of the issues was how to resolve the demands for control over activities, whether by coastal states or by an international authority, with the demands for freedom of action made by traditional or potential users of the oceans.<sup>56</sup> With the bulk of real ocean wealth located within two hundred miles of the coast, geography and economics were the dominant themes. Most states, developed or not, adopted attitudes that varied according to their geographic locations, according to whether they possessed continental shelves, and according to the form of the shelves.<sup>57</sup> Coastal states agreed on the benefits to mankind of sharing seabed riches, while at the same time they sought to extend their national sovereignty as far out to sea as possible.<sup>58</sup> Coastal states maintained solidarity on the issue even though, ironically, research indicates that should all the profits from exploiting the resources in the two hundred mile area accrue to the coastal states, more than fifty percent would go only to ten states. Furthermore, more revenues would accrue to thirteen

developed states than to all one hundred and twenty countries of the Third World.<sup>59</sup> Maritime and industrialized states, while agreeing to share seabed resources and profits with the international community, sought to preserve the freedom of the seas doctrine. They subscribed to the freedom of navigation and the development of the deep seabed mining industry under the free market system. Thus, while most states were united in advocating a new kind of internationalism, they retained and demonstrated nationalistic tendencies.<sup>60</sup>

Assuming the lead, the United States submitted the first draft seabed proposal to the Permanent Seabed Committee on August 3, 1970. Noting that the present law of the sea was too inadequate to meet the needs of modern technology and the concerns of the international community, the draft proposal called for a new multilateral agreement to prevent national conflict and rivalry.<sup>61</sup> Divisible into three parts, the draft proposal provided for the delimitation of the seabed under national jurisdiction; the establishment of an interim regime for seabed mining prior to the Convention's entering into force; and, the powers and duties of the International Seabed Authority (ISA).

Addressing both coastal and maritime state concerns, the United States proposed the establishment of a twelve-mile territorial sea coupled with the freedom of navigation on, over, and through international straits. Using the two hundred nautical mile figure in the 1958 Geneva Convention on the Continental Shelf, the United States proposal called for all nations to adopt a treaty under which they would renounce national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of two hundred metres and agree to regard all mineral resources beyond this point as the common heritage of mankind. Beyond the two hundred metre limit, the ISA would establish two different systems for exploring and exploiting seabed mineral resources. Between the two hundred metre limit and the outer edge of the continental shelf, the ISA would establish a Trustee Zone. The Trustee Zone would be managed by the coastal state. The coastal state would have exclusive jurisdiction over all exploration and exploitation activities in the Zone. As trustee, the coastal state would retain a portion of the international revenues generated in the Zone. The remainder of the profits would be turned over to the ISA for distribution to the poorer nations.

Since neither the Trustee Zone nor the ISA would come into force until after the new law of the sea convention was ratified, the draft proposal provided for the establishment of an interim regime. As envisioned by the United States, coastal states would continue to explore and exploit the mineral resources in the future Trustee Zone during the interim period. Exploration and exploitation activities would continue beyond this point as well. However, a substantial portion of the mineral royalties would be transferred to the ISA. The ISA would, in turn, use the royalties for international community purposes, particularly economic assistance to the poorer nations.<sup>63</sup>

The international area would begin at the outer-edge of the Trustee Zone and would be under the exclusive authority and regulation of the ISA. Over half the articles in the draft proposal were devoted to the powers and duties of the ISA.<sup>64</sup> As the primary function of the ISA would be issuing licences and resolving overlapping site disputes, an operations commission and a tribunal would be appointed. The operations commission would upon receipt of a specified fee issue a licence to a contracting party, parties, natural or juridical persons under its authority and sponsorship.<sup>65</sup>

The licence would grant the licensee exclusive exploration and exploitation rights in a specified area, or areas, of the deep seabed. The tribunal would resolve all seabed mining disputes in the international area through legal processes. The resolution of disputes would be mandatory.

The ISA would also establish an assembly and an executive council. The assembly of all states, each having one vote, would be responsible for general policy. The ISA's most powerful body would be the executive council. As the main decision-making organ, the executive council would reflect the producer and consumer interests of those states most concerned with deep seabed mining. Elected every three years, the executive council would consist of representatives from the six most industrially advanced states and eighteen additional countries of which twelve were to be developing nations. At least two of the twenty-four members would be landlocked or geographically disadvantaged states.<sup>66</sup>

Since there would be a renunciation of existing rights when the Convention entered into force, the draft proposal contained a grandfather provision. Due protection for the integrity of investments made prior to the Convention coming into force was

guaranteed. Grandfather rights would also ensure the continuation of seabed exploration and exploitation during the interim period.

In conclusion, the draft proposal stipulated that the United States would not view the new law of the sea as timely unless it was achieved in accordance with the General Assembly schedule. The schedule called for UNCLOS III to produce a new convention by 1974 or, at the very latest, 1975.<sup>67</sup>

As an examination of the draft proposal indicates, the United States demonstrated a considerable degree of willingness to compromise. Although it preferred the historic three-mile limit, the United States was prepared to accept a twelve-mile territorial sea so long as the freedom of navigation through international straits was guaranteed. If endorsed, the provision would accommodate the interests of both coastal and maritime states. On the one hand, the United States' national strategic interests mitigated against a broad extension of coastal state jurisdiction. On the other hand, the United States recognized the improbability of coastal states, particularly those with long coastlines and/or broad continental shelves, agreeing to a two hundred metre limit. The Trustee Zone was, therefore, a compromise. The Trustee Zone

combined relatively narrow limits of national sovereignty over seabed resources with a pragmatic division of royalties and administration of continental shelf resources.<sup>68</sup> With all rights of coastal states in the Trustee Zone specifically delegated in the Convention and restricted to the seabed, coastal states would be prohibited from extending their sovereignty to the superjacent waters.<sup>69</sup> National sovereignty and national economic interests were, therefore, balanced with national strategic interests.

At the same time, the Trustee Zone assured the continued exploration and exploitation of the seabed during the interim period. To protect the integrity of investments made before and during the interim period, the draft proposal provided for Grandfather rights. Without guaranteed investment protection, investors might suspend all deep seabed activities until after an accord was reached. While neither the United States nor the other industrialized states favoured suspending seabed activities during the interim period, the developing nations did. Therefore, to entice the developing nations, the United States proffered immediate financial compensation. Rather than waiting until after an accord was struck, the Trustee Zone would generate mineral revenues for the international



community, particularly the poorer nations, during the interim period. Since most of the revenues to be shared from the Trustee Zone would come from the United States, it was a very generous proposal.<sup>70</sup>

The draft proposal clearly demonstrates the paramountcy of international and national security interests to the United States. For the sake of international peace and security, the United States proposed a balance of interest accord between the diverse and conflicting groups. Economic concessions to coastal and developing states are balanced with the freedom of action for maritime and industrialized states. Economic concessions indicate the willingness of the United States to compromise its national economic interests in exchange for concessions on national strategic interests. However, the United States was not prepared to sacrifice the former for the latter.<sup>71</sup> To protect both its national strategic and its national economic interests, the United States employed two strategies. First, in tabling the first draft proposal the United States set the agenda. Other states were not only forced to address the issues identified by the United States, they were required either to endorse the proposals or offer acceptable

alternatives. The United States, therefore, narrowed the focus of discussion to those areas of greatest importance to itself. Second, the skillful linkage of issues in the draft proposal limited the ability of other states to manoeuvre. In order for coastal states to extend their national jurisdiction, they had to concede navigational freedoms--no freedom of navigation through international straits, no twelve-mile territorial sea. Sovereignty over the mineral resources in the Trustee Zone required coastal states to concede jurisdiction over the superjacent waters. To receive immediate financial benefits from exploiting the deep seabed, coastal and developing states would have to endorse the Trustee Zone, the two hundred metre limit, and Grandfather rights. And, the establishment of an international regime was contingent upon developing the deep seabed mining industry under the market system. In effect, then, the United States' draft proposal not only forced other states to address specific issues, it forced them to recognize countervailing interests.

Canada's initial response to the United States' draft proposal was outrage. From Canada's perspective, the two hundred metre depth line and the Trustee Zone undermined Canada's national

sovereignty and national economic interests. If adopted, the proposal would deprive Canada of its acquired rights over the continental shelf and continental shelf resources. Since the continental shelf off Canada's east coast extends more than six hundred miles seaward, the loss would be significant in terms of national sovereignty and national economic interests. Renunciation of the 1958 Geneva Convention on the Continental Shelf was, therefore, as anathematic to Canada as renunciation of navigational freedoms was to the United States.

As a regional, not a global, power, Canada is less concerned than the United States with maintaining the maximum possible freedom for international use of the oceans.<sup>72</sup> Although Canada shares the United States' and other Western powers' preoccupation with global naval strategy, Canada is more concerned with naval passage through straits close to its shore.<sup>73</sup> This is particularly true with respect to the Northwest Passage. While Canada claims that the Northwest Passage is *inter alia* an internal strait, the United States and other maritime powers maintain that it is an international strait. The United States' linkage of the twelve-mile territorial sea with the freedom of navigation through international straits was, therefore,

problematic for Canada. On the one hand, Canada wanted its unilateral extension of the territorial sea to be entrenched in international law. On the other hand, Canada did not want the Northwest Passage to be governed by the provision. The problem for Canada, then, was to draft a counter-proposal which would secure the former and prevent the latter.

The third area of concern elicited by the draft proposal was deep seabed mining. As a prospective developer of the deep seabed mining industry, Canada sought equal access to seabed resources for the Canadian mining industry. As a land-based mineral producer and exporter, however, Canada advocated limitations on the production of deep seabed minerals, particularly nickel.<sup>74</sup> As envisioned by Canada, then, the ISA would have the power to limit seabed mineral production but not to limit Canadian access to deep seabed mining. But, the United States' draft proposal did not distinguish between land-based and seabed mineral production. "Drawing up special restrictions for one source of minerals and not the other was", according to the United States, "equivalent to agreement by treaty to discriminate against all states who may be seabed producers."<sup>75</sup> Hence, the United States' draft proposal treated seabed mineral

production in the same manner as land-based production.

The centrality of these issues to Canada's national oceans policy rendered the United States' draft proposal unacceptable. For Canada to secure its law of the sea goals, its national sovereignty and national economic interests would have to be protected and/or extended not, as proposed by the United States, limited. In fact, if Canada were to achieve its law of the sea goals, limitations would have to be imposed on the national strategic and national economic interests of the United States. Canada's strategy was to employ strong diplomatic initiatives followed by the tabling of a counter-draft seabed proposal.

To defend its national sovereignty and national economic interests, Canada had to defend the four 1958 Geneva Conventions, particularly the Continental Shelf Convention. However, defending the Conventions gave rise to the question of credibility. Although Canada was a strong proponent of the Conventions at UNCLOS I, and had even invoked the Conventions to support its unilateral claims, Canada had never ratified them. As recorded, Canada did not ratify the 1958 Geneva Convention on the Continental Shelf until March, 1969. Therefore, the Convention's provisions did not apply to Canada

until March, 1970. It is not insignificant that Canada did not ratify the Convention until almost two years after Ambassador Pardo urged the international community to renounce all national claims to the continental shelf beyond the two hundred metre limit. Ratification was, clearly, fundamental to Canada's strategy. Having ratified the Convention, Canada was now in the position to expand on its virtues.

In December 1970, Canada took its case to the General Assembly. Extolling the substantial achievements of the four 1958 Geneva Conventions, Canada appealed to the General Assembly for retention. Reopening all of the rules of law embodied in the Conventions would, according to Canada, prejudice their achievements and was, therefore, inadvisable.<sup>76</sup> Maintaining that the continental shelf extended out to the continental margin, Canada proposed an alternative to the United States' two hundred metre limit and Trustee Zone. As proposed by Canada, coastal states would immediately declare the area of the seabed which by any reckoning was beyond their present or possible future national jurisdiction; commit a percentage of all future oil, gas and mineral revenues within their territorial waters to an international agency for

distribution to the poorest countries; and, pay a fixed percentage of all the revenues derived from the whole seabed area claimed by them beyond the outer limits of their internal waters.<sup>77</sup> Hence, whereas the United States proposed economic concessions in exchange for limited national sovereignty, Canada offered economic concessions in exchange for extended national sovereignty. Having appealed to the General Assembly to protect the sovereignty interests of coastal states, Canada turned its attention to the Permanent Seabed Committee.

On August 24, 1971, Canada tabled a detailed draft seabed treaty proposal in the Permanent Seabed Committee. Like that of the United States, the Canadian proposal adopted a compromise approach to the Law of the Sea negotiations. However, unlike the American proposal, the Canadian proposal emphasized the national sovereignty and national economic interests of the coastal state. Reiterating that coastal states, not the international community, define the outer limits of their continental shelves, the Canadian proposal called for revenue sharing during the period of transition. Similar to the United States proposed interim period, the Canadian transitional period guaranteed revenue sharing during the negotiating process.

To ensure a speedier negotiating process, Canada proposed that all states identify and resolve all minimum non-contentious issues prior to the start of UNCLOS III. And, during the negotiating process, Canada recommended two different forms of revenue sharing. First, a skeleton authority would be established to govern the area of the seabed which coastal states designated as outside their national jurisdiction. The skeleton authority would licence and regulate activities in the international area, and collect revenues from the exploitation of seabed revenues. Second, the Canadian proposal recommended the establishment of an international development fund. Coastal states with incomes from the exploitation of their continental shelf areas would make voluntary contributions to the international development fund. A portion of the revenues would be distributed to the developing nations with the lion's share going to the poorest nations.

While the Canadian proposal supported the establishment of a twelve mile territorial sea in exchange for navigational freedoms through international straits, it distinguished between international straits. According to the Canadian proposal, to qualify as an international strait there must be evidence that the strait was



traditionally used for international navigation. The "traditional use" clause was essential to the protection of Canadian sovereignty over the Northwest Passage. Since Canada maintained that the Northwest Passage was an internal not an international strait, it would be able to invoke the "traditional use" clause to exempt the Northwest Passage from the Convention.

In line with the United States' draft treaty proposal, the Canadian proposal endorsed the establishment of a relatively weak international regime. Under the Canadian proposal, the international regime would be mandated primarily for the purpose of issuing licences to private and state enterprises. However, as envisaged by Canada, the international regime would be endowed with strong regulatory powers. Using these powers, the ISA would prevent the wholesale exploitation of deep seabed minerals, particularly nickel. To this end, the Canadian draft treaty proposal called for the establishment of an assembly, a council, a secretariat and a tribunal. It did not, however, provide for a veto or weighted voting in the executive council. Instead, Canada proposed equal voting and the allocation of four permanent executive council seats for land-based mineral producers.

A comparison of the United States' and Canada's draft seabed treaty proposals reveals their fundamentally different law of the sea interests. Although both draft proposals provide for the establishment of a twelve-mile territorial sea, revenue sharing, and a relatively weak international regime, they differ in form and substance. Whereas the United States' two-hundred metre limit and Trustee Zone was designed to limit national sovereignty, Canada's retention of the 1958 Geneva Convention on the Continental Shelf was directed towards the protection and/or extension of national sovereignty. While both proposals call for revenue sharing, there is a subtle difference. The United States' proposal does not specify whether revenue sharing is mandatory or voluntary. The Canadian proposal, however, clearly stipulates that revenue sharing is voluntary. In using the voluntary provision, Canada provided an escape route for coastal states intent on protecting their national economic interests.

A similar situation exists with the extension of the territorial sea. To protect its national strategic interests from creeping national jurisdiction, the United States made acceptance of the twelve-mile territorial sea conditional upon the freedom of

navigation through international straits. To protect its national sovereignty interests, however, Canada limited the freedom of navigation to international straits traditionally used for international navigation. In so doing, Canada provided an escape clause for coastal states with national sovereignty interests. And, whereas the United States sought to protect its mineral consuming interests, Canada sought to protect its mineral exporting interests. The United States' hierarchically structured ISA contrasts sharply with Canada's land-based producer interests. Hence, whereas the United States' proposal assigns decision-making power in the ISA to the industrial powers, Canada's proposal grants equal decision-making authority to land-based mineral producers.

There was one issue, however, on which the United States and Canada were in complete accord. Both states were willing to proffer economic concessions in order to protect their law of the sea goals. The United States was willing to compromise its national economic interests in exchange for concessions on national strategic interests. And, Canada was willing to compromise its national economic interests in exchange for concessions on national sovereignty interests. The importance of national economic

interests in the achievement of a new international law of the sea accord was clearly understood by both the United States and Canada. Economic concessions notwithstanding, both the United States and Canada would have to enlist the support of the developing and coastal states in order to achieve their law of the sea goals.

Anticipating that the entire ocean was about to be partitioned off, coastal states, particularly developing nations, began to extend their national sovereignty as far out to sea as possible. By March 1970, all coastal states in South America, except for the northern states of Colombia, Guyana, and Venezuela, claimed two hundred-mile territorial seas.<sup>78</sup> In addition, they claimed jurisdiction over the entire continental shelf even when it extended beyond the two hundred-mile limit. With the exception of the Ivory Coast, all African coastal states claimed twelve-mile territorial seas except for eighteen states which claimed territorial seas of twenty to two hundred miles.<sup>79</sup> For reasons of consistency, the OAU proposed that coastal states adopt a twelve-mile territorial sea and a two hundred mile Exclusive Economic Zone (EEZ) coupled with a regime of innocent passage. However, contrary to its South American allies, the OAU rejected coastal state sovereignty over the continental

shelf. The OAU argued that annexation of the continental shelf and its resources would increase the territory, economic, and political power of coastal states at the expense of non-coastal states. For this reason, the OAU proposed that the entire continental shelf be designated the common heritage of mankind.<sup>80</sup>

In 1971, the developing nations presented six different draft seabed treaty proposals to the Permanent Seabed Committee. Consistent with the developing nations' diverse interests in the conventional uses of the sea, the draft proposals reflected both coastal and non-coastal state interests in the territorial sea, the EEZ, and the continental shelf. However, the developing nations maintained solidarity with respect to their provisions for a powerful supranational authority. All six draft seabed treaty proposals called for the establishment of a highly centralized and bureaucratically structured ISA with comprehensive powers over all aspects of deep seabed mining.<sup>81</sup> None of the draft proposals provided for a system of weighted voting calculated to perpetuate the rule of the most powerful.<sup>82</sup> Nor were there any provisions for a system of licensing designed to give an unfair advantage to the technologically advanced states and lead to the development of

monopolies to serve the interests of individual and private companies.<sup>83</sup> Instead, the ISA, as proposed by the developing nations, would:

1. Be hierarchically structured with the executive council under the supervision of the assembly which would be the supreme organ of the ISA;
2. Operate on a system of one nation one vote with no preferential voting rights for the technologically advanced states;
3. Establish an international machinery with the power to explore and exploit the deep seabed and its resources;
4. Have extensive powers in the control, management and regulation of activities in the area including the use and marketing of raw materials;
5. Ensure the active participation of the developing nations in all aspects of seabed mining through training programmes and the publication of all research plans and findings;
6. Protect land-based producers from the adverse economic effects of deep seabed mining through a program of rational exploitation and price stabilization;
7. Set international commodity ceilings for minerals that are readily available in the world market;
8. Relate the sharing of benefits to the needs of countries on the basis of an agreed scale whereby the least developed countries would receive the most and

the most developed countries would receive the least;

9. Assume the responsibility for training personnel from the Third World including the transfer of blueprints and the establishment of a fund for financing the training program;
10. Guarantee the participation of all national liberation movements recognized by the OAU and the Arab League as observers at UNCLOS III.<sup>84</sup>

As envisaged by the developing nations, then, deep seabed mining, and most particularly the ISA, would facilitate the creation of a new world economic order. Unlike other international organizations, the ISA would be controlled by the general assembly. And, since the general assembly would be controlled by the developing nations, ergo the ISA would be controlled by the developing nations. Using this control, the developing nations would effect a new world economic order.

While the developing nations' provisions for deep seabed mining were completely inconsistent with those of the United States, they were only partially inconsistent with Canada's provisions. Whereas the United States advocated developing the deep seabed mining industry under the free market system, the developing nations

rejected the market system. The Canadian proposal, however, contained aspects of both the United States' and the developing nations' provisions. As an industrialized state, Canada supported the free market system. As a developing state, in terms of mineral exports, Canada supported a regulated system. To accommodate its dual and conflicting interests, Canada recommended that deep seabed mining be developed under a regulated market system.

As a result of these diverse and conflicting seabed mining interests, the Permanent Seabed Committee failed to achieve its mandate. After three years and six negotiating sessions, there was neither an organizational framework nor an agenda for UNCLOS III. Even though the draft treaty proposals contained provisions which sundered the Permanent Seabed Committee, they remained the underlying basis of negotiations at UNCLOS III.



## VI

### UNCLOS III

The Twenty-fifth Session of the General Assembly voted to convene the Third United Nations Conference on the Law of the Sea (UNCLOS III) in August 1973. On December 17, 1970, the General Assembly adopted Resolution 2750 (XXV) which provided for the establishment of an equitable international regime of universal character including the international machinery, for the area and the resources of the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.<sup>85</sup> The comprehensive mandate required that the Conference determine a precise definition of the international area and deal with a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea and the contiguous zone, fishing and the conservation of the living resources of the high seas, the preservation of the marine environment, and scientific research.<sup>86</sup> The expectation was that a new law of the sea convention would be produced by mid-1975 at the latest. However, given the comprehensive mandate of the Conference, a number of

states questioned the practicality of a two-year time frame.

The United States, the Soviet Union, Britain, France, Japan, and West Germany challenged the comprehensive mandate. Arguing that the issues were too complex to be dealt with in one conference, they advocated the convening of two separate conferences--one to deal with the conventional uses of the sea and one to deal with the international regime. To convene such a comprehensive conference would, in the United States' opinion, mitigate against agreement and consensus.<sup>87</sup> The developing nations disagreed. The maritime powers, particularly the United States and the Soviet Union, were more interested in achieving an accord on the conventional uses of the sea than they were in implementing the common heritage of mankind principle. Since the common heritage of mankind principle was more attuned to their interests, the developing nations insisted upon the convening of a comprehensive conference.<sup>88</sup> They believed that a comprehensive conference would force the maritime states to negotiate, even compromise, deep seabed mining issues in order to achieve an accord on the conventional uses of the sea. The developing nations, therefore, used their majority voting strength in the General Assembly to ensure that Resolution 2750 was adopted.

While both the United States and Canada voted in favour of Resolution 2750, it was for different reasons. The United States was anxious to secure a new international accord on the width of the territorial sea and the freedom of navigation through international straits. Therefore, despite its concerns about the comprehensive nature of the Conference, the United States voted in favour of Resolution 2750. However, the House and the Senate expressed reservations about the comprehensive nature of the Conference. Both considered any move to vest control over seabed resources in an international organization highly detrimental to the United States' national economic interests.<sup>89</sup> As a consequence, they warned the international community that if such a development were to occur Congress would never pass the necessary legislation to give effect to the treaty.<sup>90</sup>

Like the developing nations, Canada favoured the convening of a comprehensive conference. Unlike the United States, Canada considered the law of the sea issues inter-related and inseparable. Coastal state sovereignty, especially over the continental shelf, and the establishment of an international area were directly related and could not be dealt with separately. Canada, therefore, aligned with

the majority and voted in favour of Resolution 2750.

After more than six years in preparation, UNCLOS III was finally convened in August 1973. Heralded as the most magnificent conference in the history of the United Nations, UNCLOS III was attended by more than two thousand delegates from one hundred and fifty-eight nations. Consistent with its mandate to establish a new law of the sea of universal character, the Conference issued a consensus agreement declaration. The declaration provided that "the Conference should make every effort to reach an agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted."<sup>91</sup> The intent of the declaration was to protect the interests of the different and divergent groups at the Conference. The maritime powers and other minority groups, such as the landlocked and geographically disadvantaged states, required the consensus agreement in order to protect their interests from the overwhelming majority of developing states. The one hundred and twenty developing states, however, felt a need to protect their interests from the political, economic, and technological power of the maritime and industrialized powers. At the same time, the

developing nations were concerned that the consensus declaration would be used by minority groups to undermine the achievement of an accord. On this point, they were right. The consensus declaration not only mitigated against agreement, it prolonged the negotiating process.

The Permanent Seabed Committee's failure to agree on a single draft negotiating text also had a deleterious effect on the Conference. Without a set of working parameters, UNCLOS III could not begin negotiations. As a result, the first operational aim of UNCLOS III was to produce a draft negotiating text from which the new law of the sea could be derived. For the sake of expediency and because of the Conference's comprehensive mandate, UNCLOS III was divided into three separate committees. Committee I was responsible for establishing the legal regime of the international seabed and the powers and functions of the ISA. Committee II dealt with the conventional uses of the sea--the territorial sea, the contiguous zone, the continental shelf, international straits, navigation, high seas, and fisheries. Committee III focused on protection of the marine environment and the control of scientific research. The function of the Committees was to produce individual

draft negotiating texts which could be subsumed into a single draft text for collective negotiation and adoption at Caracas in 1975.<sup>92</sup> However, after months of intense negotiations, it was clear that the Caracas deadline could not be achieved. Rather than scuttle the Conference, it was agreed that the time-frame would be extended until agreement was reached.

The first single draft negotiating text was produced in May 1975. Profound disagreement over the text's deep seabed mining provisions, however, precipitated the drafting of a second single draft negotiating text. The second text was produced in 1976. Although the 1976 text reflected considerable achievements in Committees II and III, it also demonstrated the intensity of the divisions in Committee I. In fact, the 1976 single draft negotiating text clearly indicated that deep seabed mining was the point on which UNCLOS III might founder.<sup>93</sup> Combined, deep seabed mining, the consensus agreement, and the Permanent Seabed Committee's incompetency, sabotaged UNCLOS III. Once the time-frame was removed, the consensus agreement facilitated a hardening of positions in Committee I. As a result, UNCLOS III was transformed into two separate, albeit unofficial, conferences. While the first

conference, Committees II and III, made tremendous strides in the progressive development of international law, the second conference, Committee I, stagnated.

## VII

### COMMITTEES II AND III

Although Committees II and III dealt with the conventional uses of the sea, a number of the issues were directly related to and inseparable from deep seabed mining. The establishment of the ISA, for example, required a clear definition of the international area. But, defining the international area was predicated upon the delimitation of coastal state sovereignty, particularly over the continental shelf. The delimitation of coastal state sovereignty, in turn, had significant implications for the freedom of navigation. The resolution of these overlapping issues was, therefore, of fundamental importance to the national interests of the United States and Canada.

The United States' foremost law of the sea goal was to protect its national strategic interests. The greatest threat to the United States' national strategic interests was the extension of coastal state jurisdiction over the maritime areas adjacent to the coast. The United States' principal objective in Committees II and III was, therefore, to limit the extension of coastal state jurisdiction to the



living and non-living resources of the ocean. So long as coastal state jurisdiction was not extended to the superjacent waters the freedom of navigation would prevail and the United States' national strategic interests would be protected. Canada's principal law of the sea goal, however, was the protection of its national sovereignty interests. Since the greatest threat to Canada's national sovereignty interests was the freedom of navigation and the proposed international seabed area, Canada's main objectives in Committees II and III were twofold. First, Canada sought the expansion of coastal state jurisdiction over both the resources and the super adjacent waters of the maritime area adjacent to the coastline. Second, Canada was intent on preserving the 1958 Geneva Convention on the Continental Shelf. In effect, then, Canada sought to limit the jurisdiction of both the maritime states and the ISA. Because of the United States' and Canada's conflicting law of the sea interests, the extent to which either state achieved its goal depended upon the ability of Committees II and III to negotiate compromise resolutions.

Committee II's primary task was to achieve a balance between the interests of the world community in as free or unimpeded

navigation as possible and the interests of coastal states in national sovereignty, economics and security.<sup>94</sup> The success or failure of Committee II, therefore, rested upon negotiating agreements on the breadth of the territorial sea, the outer limits of national jurisdiction, and the definition of the continental shelf. Since the United States, the Soviet Union, and the other maritime powers made acceptance of the twelve-mile territorial sea contingent upon freedom of navigation through international straits, the issue was non-negotiable. A nine-mile extension of the territorial sea would place one hundred and sixteen international straits under the jurisdiction of coastal states. The potential would, therefore, exist for some coastal states to use their newfound jurisdiction to interfere with navigational interests. Not only did the possibility pose a threat to the national strategic interests of the United States, and the other maritime powers, it threatened the commercial interests of the international community. Consequently, the delicate balance of multilateralism and unilateralism<sup>95</sup> rested upon the willingness of coastal states to compromise.

The majority of coastal states were opposed to the freedom of navigation through international straits under their national

jurisdiction. However, their opposition conflicted with their national economic interests. Most coastal states are developing nations highly dependent upon ocean transit for the export of their natural resources. Because of this export dependency, their national economic interests are tied to foreign-owned (Western) shipping companies. The same situation applies to Canada. Although Canada is a major industrial state, its primary export is natural resources. In the absence of a major maritime shipping industry, the bulk of Canada's exports are transported by foreign-owned vessels. Attempting to interfere with the navigational freedom of the maritime industries could result in retaliatory measures, such as dramatic increases in shipping and/or insurance rates. Once coastal states recognized that the freedom of navigation is as vital to their national economic interests as it is to the maritime powers' national strategic interests, consensus was achieved.

While Canada supported freedom of navigation in general, Canada sought to limit its application to straits traditionally used for international navigation. The limitation was considered critical to Canada's sovereignty claim to the Northwest Passage. Canada contends that the Northwest Passage is an internal strait and has

not been traditionally used for international navigation. Inclusion of the "traditional use" clause in the draft article would, therefore, not only exempt the Northwest Passage from the terms of the Convention, it would strengthen Canada's sovereignty claim. As sovereignty over the Northwest Passage is integral to Canada's national oceans policy, Canadian support for the accord was conditional upon inclusion of the "traditional use" clause.

By 1975, the OAU's proposed EEZ had become the principle around which the new international system was to be built.<sup>96</sup> Negotiating a compromise between the divergent interests of coastal states and maritime states in the EEZ, therefore, became the focus of Committee II. The first conflict between the two groups centred on the status of the EEZ. While the OAU proposal combined coastal state sovereignty over the resources in the EEZ with a regime of innocent passage, it carefully avoided designating the EEZ as either territorial waters or the high seas. Save for specific resource rights, the maritime states maintained that the EEZ was part of the high seas.<sup>97</sup> Coastal states, however, argued that the EEZ was an area *sui generis*, belonging neither to the high seas nor to the territorial sea but possessing attributes of both.<sup>98</sup> If the EEZ was

designated part of the high seas, coastal state jurisdiction would be limited to the natural resources and would not extend to the superjacent waters. Since freedom of navigation, not innocent passage, would prevail, coastal states would have no jurisdiction over navigation. Neither, would coastal states have any jurisdiction over the emplacement of communications equipment and devices on the seabed of the EEZ. Hence, the status of the EEZ was of considerable importance to the interests of both coastal and maritime states.

The second area of concern elicited by the EEZ was the definition of the continental shelf. Access to the continental shelf's vast mineral resources is of considerable importance to all states. However, many states lack coastlines and/or continental shelves. Although coastal states, the shelf-locked and geographically disadvantaged states have very minimal or no continental shelves at all. Land-locked states have no coastlines and, therefore, no continental shelves. To correct this inequity, the United States and the OAU proposed that the entire continental shelf beyond the two hundred -mile limit (the United States proposed a two hundred metre depth, not mile, limit), be designated the common heritage of

mankind. In this way, coastal states would have exclusive access to the resources of the shelf under their national jurisdiction while the disadvantaged states would share the continental shelf resources in the international area. While the designation accommodated the disadvantaged states, it was biased against the interests of the broad-shelf states. Only those states whose continental shelves exceeded the two hundred mile limit were required to relinquish sovereignty. Maintaining that the designation seriously undermined their national sovereignty and national economic interests, the broad-shelf states--Argentina, Australia, Bangladesh, Canada, India and Norway--based their position on the 1958 Geneva Convention on the Continental Shelf.<sup>99</sup> Led by Canada, the broad-shelf states sought to formulate a precise geological definition of the continental shelf and to combine this definition with Canada's scheme for sharing revenues.<sup>100</sup> Under the terms of the proposal, the revenue sharing scheme would in no way prejudice coastal state sovereignty over the entire continental shelf and its resources. However, the broad-shelf states were in a minority position.

The continental shelf off the coast of most states extends less than two hundred miles seaward. Ninety-five percent of the

continental shelf on the Baltic lies at depths of less than two hundred metres.<sup>101</sup> Forty states are either land-locked or shelf-locked. Consequently, interest in the 1958 Geneva Convention on the Continental Shelf was eclipsed by the EEZ. The majority of coastal and non-coastal states favoured adoption of the two hundred mile EEZ coupled with the United States' proposed Trustee Zone. While the maritime powers are also major coastal states, their first interest in the EEZ and the continental shelf is navigation. So long as the freedom of navigation prevailed in the new zones, the maritime states, particularly the United States, were willing to compromise the economic advantages in the 1958 Geneva Convention on the Continental Shelf. Since the broad-shelf states' extended national sovereignty interests posed a threat to the freedom of navigation, the maritime states supported the majority position.

The linkage of the EEZ with sovereignty over the continental shelf was particularly problematic for Canada. On the one hand, Canada considered the EEZ the cornerstone of a successful law of the sea convention.<sup>102</sup> On the other hand, sovereignty over the entire continental shelf was the foundation of Canada's national oceans policy. Sacrificing the latter for the former was out of the question

for Canada. Canada took the position that coastal state sovereignty extended over the entire continental shelf and that the continental shelf extended out to the continental margin. Unless the Conference was willing to recognize this position, Canada warned that it was prepared either to pursue a multilateral agreement with other broad-margin states or to act unilaterally.<sup>103</sup>

As in Committee II, interest in the EEZ transcended all other issues in Committee III. Negotiations focused on who would control pollution setting standards and marine scientific research in the EEZ. The debate over pollution setting standards in the EEZ devolved into a power struggle between the coastal states and the maritime powers. While of vital interest to all parties, the issue of scientific research did not have the implications for seabed resources that pollution setting standards did. At least not for Canada. By virtue of the Arctic Waters Pollution Prevention Act, Canada claimed jurisdiction over one hundred nautical miles of the Arctic. This included jurisdiction over the exploration and exploitation of the deep seabed. Entrenching the Act in international law would enable Canada to, in effect, claim sovereignty over one hundred nautical miles of Arctic deep seabed resources. Coastal state jurisdiction



over pollution setting standards was, therefore, essential to Canada's national sovereignty interests. However, coastal state jurisdiction over pollution setting standards posed a threat to the United States' and other maritime powers' national strategic interests. As a result, neither the United States nor the other maritime powers would concede the issue.

Led by Canada, coastal states argued that jurisdiction over pollution setting standards in the EEZ was essential to their territorial integrity. Citing foreign-owned vessels as the primary source of pollution, coastal states demanded the right to establish ship setting standards in the EEZ. In extending pollution setting standards to ship setting standards, coastal states sought to gain control over the navigation, construction, maintenance, staffing and operations of all ships traversing their coastal waters. To protect its Arctic sovereignty interests, Canada also proposed that coastal states have the right to set and enforce their own standards for environmental protection in vulnerable areas, such as the Arctic.<sup>104</sup>

The maritime powers were acutely aware of the need for more stringent pollution setting standards. As coastal states, they too were subject to the aftermath of oil tanker accidents. Britain and

France were still smarting from the environmental and economic costs of the *Torrey Canyon* accident. However, they were not prepared to relinquish control over ship setting standards to coastal states. Coastal states hostile to the interests of the United States and/or other maritime states might use ship setting standards in order to interfere with the navigational freedom of commercial and warships. Coastal states aligned with one superpower could be encouraged to establish standards which discriminate against the strategic interests of the other superpower. The potential would then exist for coastal states to upset the delicate balance of power which, in large part, rested on the freedom of navigation for all warships. At the same time, there would be nothing to prevent coastal states from using their jurisdiction over ship setting standards as a bargaining chip. Economic and/or political concessions might well be extracted from maritime states or private shipping companies in exchange for relaxed pollution enforcement laws. States and private shipping companies refusing to comply might be forced to use longer and, therefore, more costly routes. Turning pollution and ship setting standards over to coastal states would, in effect, be tantamount to granting them the

authority to intervene in maritime defense and commerce. These were the same concerns expressed by the United States in 1970 when Canada legislated the Arctic Waters Pollution Prevention Act. The United States and the other maritime powers, had refused to recognize coastal state jurisdiction over pollution setting standards then and refused to recognize it now. The maritime powers, particularly the United States, insisted that the EEZ was part of the high seas and, therefore, was subject to the international rules and standards for pollution control. They were equally intransigent about ship setting standards which they maintained were, and would remain, under the domain of the flag-state.

As with the debate over freedom of navigation in international straits, the majority of coastal states concluded that jurisdiction over pollution setting standards was not necessarily in their best national economic interest. Their dependency on foreign-owned shipping companies is superseded by their dependency on access to the maritime states', particularly the United States', consumer markets. Since the maritime powers are also coastal states, the possibility existed that they would use ship setting standards as non-tariff barriers to trade. When the economic costs of retaliatory

sanctions were factored in, the coastal states relented. However, as most states have little or no interest in the Arctic, they supported Canada's proposal for coastal state jurisdiction in vulnerable areas.

The international community's desire to achieve an accord on the conventional uses of the sea is reflected in the 1975 single negotiating texts produced by Committees II and III. Incorporated into the 1976 single draft negotiating text, the draft articles produced by Committees II and III provided for:

1. The establishment of a twelve-mile territorial sea with the freedom of navigation on, over, and through straits used for international travel;
2. The establishment of a two hundred-mile EEZ in which coastal states have exclusive jurisdiction over living and non-living resources. Subject to the relevant provisions of the Convention, all states enjoy the freedom of navigation, the laying of submarine cables and pipelines, and any other internationally lawful uses of the sea related to navigation and communication;
3. The establishment of an International Trustee Zone between the two hundred-mile limit of the EEZ and the outer edge of the continental shelf. As trustees, coastal states have jurisdiction over all research, exploration and exploitation conducted in the Zone. Coastal states shall make payments in respect of exploitation of the non-living resources in the Zone to the ISA. Payments will be based on a certain percentage of the value of the volume of production;

4. Vessels navigating in the EEZ are governed by international rules and standards for the prevention, reduction and control of pollution;
5. Coastal states have jurisdiction over nondiscriminatory pollution setting standards and enforcement in areas of the EEZ which are covered with ice most of the year and where particularly severe climatic conditions exist.

As the draft articles indicate, the United States achieved its objectives in Committee II and III. The United States' fundamental objective in Committee II and III was to limit the expansion of coastal state sovereignty and jurisdiction. In Committee II, the United States success was twofold. First, coastal states did not gain jurisdiction over navigation in international straits. Second, coastal state jurisdiction was not extended to the superjacent waters of the EEZ or the continental shelf. And, in Committee III, coastal states did not acquire jurisdiction over pollution or ship setting standards in the EEZ. Equally important, the United States was not required to make any more economic concessions than those it had already conceded in its draft seabed treaty proposal. Having achieved these objectives, the United States attained its principal law of the sea goal. The United States' national strategic interests were protected from the creeping jurisdiction of coastal states.

Canada's success in Committees II and III was less impressive than that of the United States. At the most, Canada was only partially successful in protecting its national sovereignty interests. The establishment of the twelve-mile territorial sea and the two hundred-mile EEZ are consistent with Canada's objectives. Canada's unilateral claim to a twelve-mile territorial sea is now entrenched in international law. With the adoption of the two hundred-mile EEZ, Canada has acquired jurisdiction over a tremendous accretion of territory. However, in order to achieve its law of the sea goal--protecting its national sovereignty interests--Canada needed to secure its objectives. This it did not do. The text did not entrench the 1958 Geneva Convention on the Continental Shelf. Jurisdiction over resource exploitation was the only concession granted to coastal states. This was a bitter disappointment for Canada. However, since the text was only a draft, Canada did not consider the battle lost. Instead, Canada expressed a willingness to entertain the notion of profit-sharing in the Trustee Zone conditional upon the final Convention recognizing coastal state sovereignty over the entire continental shelf.

While Canada claimed that the Northwest Passage and the

Arctic Waters Pollution Prevention Act were protected by the draft text, the claim is questionable at best. The draft article on the freedom of navigation through international straits did not contain the "traditional use" clause. The draft article, in fact, provided for the freedom of navigation through straits used for international travel. Therefore, it would appear that any state wishing to use the Northwest Passage for international travel is free to do so. Whether or not the Northwest Passage has been traditionally used for international navigation does not appear to be relevant. A similar situation exists with the draft article on ice-covered areas. Coastal state jurisdiction over pollution setting standards in ice-covered or vulnerable areas was limited to the EEZ. Coastal states do not have jurisdiction over pollution setting standards in ice-covered or vulnerable areas that fall outside of their EEZs. Therefore, in order for the Arctic Waters Pollution Prevention Act to be protected by the draft article, Canada must first establish sovereignty over the archipelagic waters of the Arctic, particularly the Northwest Passage. Therefore, the draft article did not legitimize Canada's sovereignty or jurisdictional claims to the Arctic.

Canada's failure to achieve its objectives and, therefore, attain

its law of the sea goal is directly attributable to the success of the United States. When Canada's interests were consistent with those of the United States, Canada achieved its objective. And, when Canada's interests conflicted with those of the United States, Canada did not achieve its objectives. Since the United States endorsed the twelve-mile territorial sea and the two hundred-mile EEZ, Canada realized its objective of extended coastal state jurisdiction. United States support for the Trustee Zone, however, undermined Canada's efforts to retain sovereignty over the entire continental shelf. The United States rejected coastal state jurisdiction over pollution setting standards. Therefore, Canada's efforts to extend coastal state jurisdiction into this area failed. And, since the United States disputes Canada's Arctic sovereignty claims and the Arctic Waters Pollution Prevention Act, neither the Northwest Passage nor the Act were protected by the draft articles. In reality, Canada's national sovereignty objectives were not only too ambitious, they were too unrealistic. To protect and or extend its national sovereignty interests, Canada sought convention provisions which would seriously undermine the freedom of navigation and, therefore, the national strategic and economic



interests of maritime states. Therefore, the United States, not Canada, achieved its law of the sea goal with respect to the conventional uses of the sea.

Despite Canada's disappointment, the magnitude of the agreements concluded in Committees II and III cannot be overestimated. After more than four decades and three international conferences, the international community finally reached consensus on the breadth of the territorial sea and the freedom of navigation. Although the 1976 single draft negotiating text was only a procedural device and only intended to provide the basis for negotiations,<sup>105</sup> there was little doubt that the draft articles would be incorporated into the final Convention. Anticipating this development, coastal states began to declare, unilaterally, two hundred-mile exclusive fishing zones. As a result, by 1978 fifty coastal states claimed a two hundred mile fishing zone.<sup>106</sup> Consistent with these claims, Canada legislated a two hundred-mile exclusive fishing zone in 1977. Uniformity also began to develop with respect to the territorial sea. Coastal states began to adjust the width of their territorial seas to conform with the new twelve-mile international standard. Unfortunately, the wide spread

agreement on the conventional uses of the sea did not extend to deep seabed mining. While a convention on the conventional uses of the sea was all but achieved, broad divisions in Committee I made a convention on deep seabed mining far from a certainty.

## VIII

### COMMITTEE I: THE DEEP SEABED

The main protagonists in Committee I were the industrialized powers, the G77, and the land-based mineral producers. Although the United States was the only state that did not align with any one specific group, it was clearly the unofficial leader of the industrialized powers. Committed to the free market system, this group advocated the establishment of a relatively weak international authority empowered to issue licences and resolve disputes. This was the most cohesive and unified group. Its members were not only the major consumers of mineral resources, they were also the only group capable of developing the deep seabed mining industry.

The G77's efforts to present a united front were undermined by the divergent interests of the developing nations. Not all developing nations are land-based mineral producers. Those who are, do not produce the same minerals. The only true consensus among the members of this group was their commitment to a new world economic order. The G77's fundamental goal in Committee I was to

use deep seabed mining as a means of effecting a new world economic order. To achieve this goal, the G77 sought the establishment of a powerful supranational authority with profound regulatory powers.

The land-based producers were organized and led by Canada. This group's principal goal was to protect their national economies from the uncontrolled exploitation of deep seabed minerals. Therefore, they also sought the establishment of an international authority with the power to regulate and control the international seabed area. Like the G77, the members of this group had divergent and often contrasting interests. Whereas Australia and Canada are industrialized states the others are developing nations. Australia, Canada, Cuba, Indonesia, and the Philippines are nickel producers. The African states, Zaire, Zambia, and Zimbabwe, are the principal producers of cobalt. The Latin American states are primarily copper producers. Since the extent to which deep seabed mining posed a threat to a nation's economy depended upon the type of minerals it produced, the internal unity of the land-based producers was undermined.<sup>107</sup>

The conflict of interests dividing the groups escalated in 1975

when the first single draft negotiating text plus a revised set of G77 articles were tabled. Not only did the draft text give weight to the common stand adopted by the G77 on most issues<sup>108</sup>, the revised articles called for the mandatory transfer of technology to the ISA as a condition of deep seabed mining. The failure of the documents adequately to reflect the legitimate interests of the industrialized states coupled with the enormous obligations imposed upon them<sup>109</sup>, precipitated the drafting of the 1976 revised draft single negotiating text.

Prior to the drafting of the 1976 text, Secretary of State Kissinger addressed the 1976 negotiating session in New York. The intent of Kissinger's address was to enunciate clearly the United States' interest in and position on deep seabed mining. As well, Kissinger attempted to stimulate a compromise agreement by proffering American concessions to the G77 and the land-based producers. Kissinger began his address with some cautionary remarks. He cautioned that without an international accord the competition over deep seabed mining could escalate into economic warfare. As a result, not only would the freedom of navigation be endangered but it would ultimately lead to tests of strength and

military confrontations. Kissinger then reminded the Conference that the United States is many years ahead of any other country in deep seabed mining technology and is in all respects prepared to protect its interests. From a practical standpoint, investment, access, and profits are best protected in an established and predictable environment; therefore, the United States favoured an international agreement.

Following these remarks, Kissinger set forth proposals which the United States believed could form the basis for a new consensus on deep seabed mining. Since the composition of the International Seabed Authority, voting procedures, access to deep seabed resources, and production limitations were the most contentious issues, the United States proposed that:

1. The power of the Authority be carefully detailed by treaty to preserve all rights which fall outside the competence of the Authority and to avoid jurisdictional overlap with other international organizations;

1. The composition and structure of the Executive Council reflect the producer and consumer interests of those states most concerned with seabed mining; Nations most affected by the decisions of the Authority have a voice commensurate with their interests;

2. The treaty guarantee nondiscriminatory access to deep seabed resources for all states and parties without restrictive limitations on the number of sites which any one nation or party might exploit. Both a parallel mining system and an international seabed mining company, the Enterprise, be established. Individual mining contractors would propose two mine sites for exploration. The ISA would select one of the sites for mining by the Enterprise or by a developing nation. The other site would be mined by the individual contractor.

The United States would assist with the financing costs of the Enterprise and aid the developing nations in their efforts to gain access to deep seabed mining technology.

3. A temporary limitation, for a fixed period of time, be established for the production of seabed minerals. At the end of the fixed period of time, seabed production would be governed by overall market conditions.

An adjustment allowance program be established in collaboration with other international institutions for countries which suffer economic dislocation as a result of deep seabed mining.

To ensure that the concessions were not interpreted as a weakening of the United States' position on deep seabed mining, Kissinger ended his presentation with a further clarification of the United States' position. Although preferring an international accord, the United States would not, according to Kissinger, delay its efforts

to develop an assured supply of critical resources through deep seabed mining projects. To emphasize this point, Kissinger reminded the Conference that the foreign policy of the United States is conducted on the basis of the best permanent interests and values of the United States. Therefore, if the negotiations deadlocked completely, there was a much greater danger that the United States would act unilaterally than that the United States would change its position.\*\*\*\*

Clearly, 1976 was a critical juncture in the law of the sea negotiations. The United States was losing patience with the whole process. For the sake of an international accord, the United States was willing to compromise its national economic interests in deep seabed mining. It would not, however, sacrifice the freedom of action or the market system in order to achieve an accord. Therefore, the future of the accord rested on the capacity of the G77 and the land-based producers to adopt a market mentality. Otherwise, the United States would act unilaterally.

Although remarkably clear, Kissinger's message was misunderstood. The concessions offered were interpreted as a sign of American vulnerability. It was assumed, particularly by the



developing nations, that the United States was willing to sacrifice its national economic interests for the sake of its national security interests. In other words, because the United States was anxious to achieve an accord on the conventional uses of the sea it could be coerced into accepting the G77's position on deep seabed mining. The failure of the G77, and to a lesser extent the land-based producers, to recognize that the United States was seriously considering unilateral action was a monumental mistake. Rather than facilitating agreement, the 1976 single draft negotiating text extended negotiations into 1982. Part XI of the draft text contained ten articles which were consistent with the interests of the G77 but undermined the interests of the industrialized states and stimulated conflict between the land-based producer states. Since a draft convention could not be produced until an agreement was reached on the provisions of the single draft negotiating text, consensus on the controversial articles was imperative. In the interest of achieving an accord, six years were invested in negotiating the provisions of the following ten draft articles:

#### **Powers of the ISA**

The draft article provided that international regulations

governing the development of all resources of the seabed and subsoil beyond the limits of national jurisdiction were to be vested in the ISA.<sup>110</sup> The establishment of a restrictive international regime with such broad enforcement powers was anathema to the United States. The United States insisted that the powers of the ISA be carefully detailed and limited to the exploration and exploitation of the deep seabed. Otherwise, it was conceivable that the ISA might attempt to use its open-ended powers to intervene in areas outside its jurisdiction, such as the freedom of navigation on the high seas or the processing of deep seabed minerals.

While Canada agreed that the powers of the ISA would have to be clearly defined, it supported the ISA's broad regulatory and enforcement powers. It was anticipated that the ISA would use the powers to prevent the uncontrolled exploitation of deep seabed minerals, thereby protecting Canada's land-based nickel industry.

### **The Structure of, and Voting Power in, the ISA**

By the proposed plan, the ISA would consist of four organs--a general assembly, an executive council, a tribunal, and a secretariat. Unlike other international organizations, however, the main decision-making body would be the general assembly, not the executive

council. To ensure equality of power, voting in the general assembly would be governed by the principle of one nation, one vote. Since the proposal discriminated against those investing the money, scientific research, technology and expertise, it was unacceptable to the United States. As stipulated by Kissinger, the United States insisted upon the supremacy of the executive council and weighted voting. To ensure equality, the United States proposed that the executive council reflect the interests not only of producer and consumer states but also of geographically disadvantaged and developing states. But, the pre-eminence of those states with the capacity to develop the deep seabed mining industry was non-negotiable.

Since weighted voting would give decision-making power to the mineral consuming states, Canada supported the notion of one nation, one vote. To protect the national economic interests of land-based producers, Canada advocated the allocation of four permanent executive council seats to land-based mineral exporting states.<sup>III</sup> For Canada, the executive council would, of course, be the main decision-making body.

### **Financing the ISA**

As proposed, ISA financing would be based on the United Nations'

assessment system. The industrialized powers would, therefore, be responsible for sixty percent of the ISA's overall financial costs. The entire start-up costs of the ISA would be absorbed by the deep seabed mining states (the industrialized states). Fifty percent of the start-up costs would be paid directly to the ISA and loans would either be assumed or guaranteed for the other fifty percent.<sup>112</sup>

This provision is, of course, a reflection of the developing nations hopelessly unrealistic expectations of large revenues from deep seabed mining.<sup>113</sup> There is a clear lack of appreciation for the massive financial outlays and major risks involved in developing the deep seabed.<sup>114</sup> Financing only one venture per year at the smallest scale possible would, according to rough estimates, cost approximately two hundred million dollars.<sup>115</sup> To assume that the international capital market or the states party to the Convention would be able or willing to subscribe the millions of dollars required by this proposal given the awesome regulatory powers of the ISA was unrealistic.<sup>116</sup> Naturally, none of the industrialized states, including the United States and Canada, would ratify a convention under these financial terms.

## **Licensing**

Under the terms of the draft article, the ISA was granted discretionary power in the issuing of deep seabed mining licences. As proposed by the industrialized states, the purpose of licensing was twofold. First, licensing would ensure equal access to deep seabed minerals for states or parties interested in deep seabed mining. Second, a system of licensing would prevent conflicts arising over overlapping site claims. Since the power to determine who does and who does not get a licence is both discriminatory and conflict oriented, the purpose of licensing was undermined.

The potential for the ISA to use its discretionary power to discriminate against American companies was not lost on the United States. The United States insisted that the system of licensing must guarantee nondiscriminatory access to deep seabed resources for all states and parties.<sup>117</sup> Imposing arbitrary or restrictive limitations on the number of sites which any one state or party might exploit was equally unacceptable to the United States.

As Canada also expected to become an important producer of deep seabed minerals, it was anxious for Canadian companies to share in, and have equal access to, deep seabed mineral resources. Canada wanted to limit seabed mineral production not to limit

access to the deep seabed. Therefore, Canada also opposed the discriminatory powers of the ISA.

### **The Parallel Mining System**

But for one major deviation, the parallel mining system proposed in the draft text was identical to the one proposed by Kissinger. All financing and operational costs of the ISA's seabed mining company, the Enterprise, would be assumed by state and private mining interests. As with the ISA financing, these parties would pay fifty percent of the Enterprise's start-up costs and assume or guarantee loans for the remaining fifty percent. And, as a condition of licensing, they would provide the Enterprise with the technology, research, and personnel necessary to engage in deep seabed mining.

When combined with the ISA's regulatory and discretionary licensing powers, the financing provisions actually undermined the parallel mining system. Since private investors would be unable to compete, the Enterprise would gain a monopoly over deep seabed mineral production.<sup>118</sup> Furthermore, in the absence of any licensing guarantees, there would be nothing to prevent the ISA from discriminating in favour of the Enterprise. Once the Enterprise acquired the capital and the expertise it would, therefore, have a

monopoly. For these reasons, the United States rejected the proposal outright.

As early as 1973 Canada recommended the adoption of a joint-venture system between private interests and the ISA. The Canadian proposal provided for joint-venture arrangements involving revenue sharing as opposed to production sharing.<sup>119</sup> Shifting the focus to revenue sharing would eliminate the enormous financing costs of the Enterprise; enable developing nations to share in seabed revenues without imposing onerous obligations on the industrialized states; and, restrict the ISA's ability to gain control of seabed production. While the G77, the United States, and Britain showed initial support for the Canadian proposal, the G77 favoured the parallel system. Whereas the joint-venture system would give the G77 access to seabed revenues, the parallel system would give the developing nations access to technology as well as capital. Because the G77 was intent on acquiring technology as well as, if not more than, capital, it was reluctant to renegotiate the proposed parallel mining system.

### **The Mandatory Transfer of Technology**

The draft article on the mandatory transfer of technology was

consistent with the G77's 1975 revised draft articles. State and private interests were obligated to transfer their technology to the Enterprise as a condition for obtaining a mining licence.<sup>120</sup> Parties refusing to comply with the provision would be denied mining licences. Because the draft article failed to provide adequate protection for the owners of the technology, it effectively extended the power of the ISA. Using the mandatory transfer of technology provision, the ISA could legitimately restrict access to the deep seabed. This draft article, more than any other, brought the ideological conflict to the fore. Under the terms of the article, the Enterprise would acquire the technology and then turn it over to the developing nations wishing to engage in deep seabed mining. The mandatory transfer of technology provision was, therefore, the means by which the G77 could effect a new world economic order.

Not only was the mandatory transfer of technology coercive, it was a direct violation of the free market principle that the owners of technology have rights in its sale and use.<sup>121</sup> Even assuming that the industrialized states were willing to support the provision, domestic political limitations would prevent them from doing so. Offering to assist the developing nations in their efforts to acquire



seabed mining skills and technology was, therefore, as far as the United States would go.

While Canada shared the United States', and the other industrialized states', views on the mandatory transfer of technology, it took a balanced approach to the draft article. On the one hand, Canada pointed out the impracticalities of transferring patented technology. On the other hand, Canada stressed the need of the developing nations to benefit from ocean-related technology.<sup>122</sup> The balanced approach was a political necessity for Canada. Outright condemnation of the provision might cost Canada the support of the G77 for production limitations. However, total support for the provision was inconsistent with Canada's interests. Thanks to the other industrialized states, Canada was able to waffle on the issue. With the industrialized states aligned against the mandatory transfer of technology, Canada's deep seabed mining interests were protected.<sup>123</sup>

### **Production Limitations**

The production limitation formula contained in the draft text was designed by the United States and Committee I Chairman Paul Engo. The formula arbitrarily established a six percent increase per

annum in world nickel demand and provided that deep seabed nickel production would not exceed the cumulative increase in world demand. According to Canada, if the demand for nickel were to increase six percent, land-based production would be only marginally affected by deep seabed production. However, if world demand was lower than six percent, or actually decreased, the result could be a limitation on land-based production.<sup>124</sup> The formula was, therefore, totally unacceptable to Canada.

If the rate of increase in world nickel demand was as low as three percent, as Canada predicted it would be, while seabed nickel was mined to meet the projected six percent increase, land-based production would suffer. Seabed production under the proposed formula would, given this scenario, have a deleterious effect on the production of nickel in Canada.<sup>125</sup> Canada, therefore, argued that not only was the projected rate of increase too high but that deep seabed mining would have to be phased in over a number of years. While opposed to production limitations, in general, the United States was willing to accept temporary limitations for a fixed period of time. Consequently, in May, 1978, the United States and Canada tabled a compromise formula. The new formula provided that for the first

twenty-five years of deep seabed mining, the maximum production of seabed nickel would not exceed sixty percent of the annual increase in world consumption. Although the compromise formula diffused tensions between the United States and Canada, it did resolve the conflict over production limitations.

Canada's zeal for production limitations was not shared by the G77 or the majority of industrialized states. And, while the land-based mineral producers favoured production limitations, they disagreed on the formula. Production limitations were counter-productive for the G77. The G77's primary objective was the transfer of seabed mining profits and technology to the developing nations. The fewer the minerals produced, the lower the profits and, therefore, the smaller the sums transferred to the developing nations.<sup>126</sup> And, since the mandatory transfer of technology was related to production, a limitation on one was an automatic limitation on the other. For the developing nations to gain the maximum possible benefits from deep seabed mining, unlimited, not limited production was necessary. However, while unlimited production was in the best interest of the group as a whole, it was not in the best interest of the land-based mineral producers. To a

certain extent, the economic benefits accruing to the group in general would be acquired at the expense of the land-based producers. Therefore, for the sake of group cohesion, the G77 supported production limitations.

The industrialized states maintained that production limitations were discriminatory. The proposed formula protected the interests of the land-based producers at the expense of the deep seabed producers. The formula's built-in bias restricted the industrialized states capacity to generate revenues and acquire access to seabed mineral resources without imposing similar restrictions on land-based producers. Production limitations would, because of the high costs associated with deep seabed mining, discourage private investors from developing the industry. Only those states with extremely limited access to mineral resources would be willing to underwrite deep seabed mining projects. Based on these arguments the industrialized states, particularly the United States, maintained that seabed production must be governed by overall market conditions.<sup>127</sup>

Not only did the production limitation formula discriminate against deep seabed miners, it discriminated against the land-based

cobalt producers. The discriminatory nature of the formula stemmed from the uneven admixture of the minerals found in seabed nodules. The nodules have a higher content of cobalt than nickel and a higher content of nickel than copper. Any formula based on nickel production would, therefore, provide the greatest protection for copper producing states and the least protection for cobalt producing states.<sup>128</sup> Since most of the Latin American states are copper producers, they were the first to lose interest in the production formula.<sup>129</sup> Never a strong advocate of production limitations, Australia concluded that they were impractical. From 1980 on, Australia aligned with the other industrialized states in support of free market forces rather than quantitative measures.<sup>130</sup> With the abdication of the Latin American states and Australia, the land-based producer group was left to the hardliners--Canada, Indonesia, the Philippines, Zaire, Zambia, and Zimbabwe. However, the intra-group conflict was as great as the inter-group conflict. Whereas the nickel producers defended the production formula, the cobalt producers argued that it discriminated against their interests. As a result, group unity was eroded and Canada's leadership strength was undermined.

## **Financial Compensation**

The text contained two draft articles designed to protect the developing nations' economic interests from the disruptive influences of deep seabed mining. The first article stipulated that the ISA would provide financial compensation to the developing nations if their land-based resource industries were adversely affected by seabed mineral production. The second exempted developing nations, which are net importers of hydrocarbons, from revenue-sharing obligations in the Trustee Zone. Combined, the draft articles provided the developing nations with the opportunity to share in the benefits from deep seabed mining without sharing in the costs.

While the United States supported an adjustment allowance program, it opposed the establishment of a permanent compensation fund administered by the ISA. As proposed by the United States, the adjustment allowance program would be designed and administered in collaboration with other international organizations. Exemptions from revenue-sharing were also unacceptable to the United States. The provision not only discriminated against the developed states which were net importers of hydrocarbons, it undermined the

economic interests of the land-locked and geographically disadvantaged states. If the developing coastal states were permitted to retain the ISA's share of Trustee Zone revenues, they would, in effect, be taking money from the poorest nations. This was, of course, inconsistent with the common heritage of mankind principle.

From Canada's perspective, the compensation fund and revenue-sharing exemption were subsidies. Since both direct and indirect subsidies would give an unfair advantage to Canada's competitors in developing countries<sup>131</sup>, they were impediments to Canadian ratification of the law of the sea convention.

### **National Liberation Movements**

In spite of profound United States' opposition, the G77 secured Conference observer status for national liberation movements such as the PLO and SWAPO. Then, in 1975, the G77's revised set of draft articles raised the status of the national liberation movements from observer to equal partner in deep seabed mining. Consistent with these manoeuvres, the 1976 single draft negotiating text granted national liberation movements equal rights in the sharing of revenues from deep seabed mining.<sup>132</sup> To propose that the ISA have

the power to transfer funds to political regimes or would-be ruling parties was irrational. Only states party to the Convention would be governed by its provisions. Nonetheless, the United States was outraged by the mere suggestion that it would be party to a convention which provided financing assistance to groups which were hostile to the United States' interests.

### **Convention Review**

The provision for convention review at the end of fifteen years was unacceptable to the industrialized states. Under the terms of the draft article, after five years of negotiations the convention could be amended by a two-thirds majority vote. States party to the convention would be bound by the amendments. When combined with the one nation, one vote principle, there was inadequate protection for the interests of the industrialized states. States with the least investment in deep seabed mining could combine their votes in order to push through amendments which discriminate against the interests of those states with the greatest investment. Since there was no guarantee that the convention could not be amended against their will, the industrialized states sought radical changes to the draft article.



## **Investment Protection**

Prior to the General Assembly decision to establish the ISA and the international area, deep seabed mining was conducted under the auspices of individual states, particularly the industrialized powers. While willing to suspend licences, these states sought assurances that the integrity of investments made under their jurisdiction would be protected. As proposed in the United States' draft seabed treaty, all investments made prior to the convention entering into force would be protected. During the interim period, coastal states would continue to issue licences for exploration and exploitation of the continental shelf beyond the proposed two hundred-metre outer limit. However, a substantial portion of the revenues would be transferred to the ISA. The issuance of licences for exploring and exploiting the deep seabed would be suspended until the convention entered into force. Although endorsed by the industrialized states, the United States' proposal was vehemently rejected by the G77.

To protect the common heritage of mankind principle from the unlimited claims of state and private investors, the G77 aligned behind Moratorium Resolution 2574D (XXIV). Tabled at the twenty-fourth session of the General Assembly, by members of the OAU, the

Resolution provided that pending the establishment of an international regime, states and persons shall refrain from exploiting the seabed areas beyond the present national jurisdiction and no claim to any part of that area or its resources shall be recognized.<sup>133</sup> To strengthen the Resolution, the G77 proposed that all research and development respecting deep seabed mining technology be suspended during the interim period. While the industrialized states agreed to suspend licensing during the interim period, they would not agree to suspend technological research and development. The G77 retaliated by blocking all efforts to include pioneer investment protection in the single draft negotiating text.

Consequently, there was no provision for investment protection in the 1976 single draft negotiating text. Pioneer investors, therefore, stood to lose both their investments and their mining sites to which they had a prior claim. As a result, the industrialized states refused to be party to any convention which failed to guarantee pioneer investment protection. Since the majority of pioneer investors were American, the United States stood to lose the most. Unless pioneer investments were protected in the convention, the United States was prepared to proceed unilaterally with deep

seabed mining. As with the mandatory transfer of technology provision, Canada took a balanced approach to pioneer investment protection. On the one hand, Canada argued in favour of protection. On the other hand, Canada distinguished between the right to develop ocean technology, which it supported, and the actual unilateral exploitation of the deep seabed, which it opposed.<sup>134</sup>

After six years of non-productive negotiations there was a hardening of positions and a widening of the gap between the G77 and the industrialized states. A number of states had begun to question the value of pursuing seemingly interminable negotiations.<sup>135</sup> A number of industrialized states were preparing to resume issuing seabed mining licences. And, the United States was proceeding with legislation which would enable it to go ahead unilaterally with the exploration and exploitation of the deep seabed.<sup>136</sup> While overwhelming support for the text's provisions on the conventional uses of the sea meant that the cleavage was not all embracing it was, nonetheless, ironclad. As a consequence, the United States suspended negotiations in 1981.

On March 1, 1981, the new Reagan administration informed the Conference that the United States had decided to undertake a one-

year review of the single draft negotiating text. As stated by President Reagan, the review was necessitated by part XI of the draft text which the United States executive believed mitigated against obtaining the advice and consent of the United States Senate.<sup>137</sup> Based on the findings of the comprehensive, inter-agency review, the United States executive concluded that while most of the draft provisions were consistent with the United States' interests, the major elements of the deep seabed mining regime were not.<sup>138</sup> Therefore, on January 29, 1982, President Reagan announced that the United States would return to UNCLOS III to seek the necessary changes to the deep seabed mining provisions. While not specifically stated, the President's statement contained the same message as Kissinger's 1976 statement. Unless changes were forthcoming, the United States would proceed unilaterally with deep seabed mining. Canada got the message. Since United States unilateral action would undermine Canada's national economic interests, Canada was motivated to seek a compromise agreement.

However, Canada's capacity to mediate an accord was circumscribed by its declining status at the Conference. By 1981, Canada had become isolated diplomatically.<sup>139</sup> Taking a balanced

approach on the more contentious issues had cost Canada its credibility with the other protagonists. Aligning with the industrialized states on the issues of technology transfers, the structure and financing of the ISA, the compensation fund and the exemption from revenue-sharing while courting G77 support for production limitations, had cost Canada dearly. The G77 felt that the production limitation formula was biased in favour of Canada and that Canada was, therefore, one of the major beneficiaries of the Conference.<sup>140</sup> However, to acquire these benefits Canada might have exploited the developing nations, particularly the land-based cobalt producers.

Relying on the industrialized powers to protect those interests which it had in common with them while diametrically opposing their position on production limitations was even more costly for Canada. It split the Canadian delegation and caused the major Canadian mining companies, Noranda Mines and Inco, to align with the United States. Canadian delegates who supported the industrialized powers' position on deep seabed mining felt that Canada's policies undermined its interests as an industrialized state. They, therefore, broke rank and sought alliances with the United States and

Britain.<sup>141</sup> Noranda Mines joined an American deep seabed mining consortium and Inco applied for deep seabed mining licensing under the United States' new legislation.<sup>142</sup>

Canada's position on unilateralism was also inconsistent. Canada's national oceans policy was founded on unilateralism. As recently as 1977, Canada used unilateralism to declare a two hundred-mile exclusive fishery zone. Yet, Canada ardently opposed all moves toward unilateral action in deep seabed matters.<sup>143</sup> The contradiction can only be explained in terms of self-interests. Canada used and defended unilateralism in the conventional uses of the sea because it was in Canada's best national sovereignty and national economic interests to do so. Canada opposed unilateralism in deep seabed mining because it might have a deleterious effect on Canada's land-based mineral exports. As a result, Canada appeared to align with the developing nations against the industrialized states, particularly the United States, and its own mining companies.

While Canada's balanced and inconsistent approach to negotiations was necessitated by its dual position as an industrialized and land-based producer state, it, nonetheless, undermined Canada's credibility. Consequently, Canada was unable to

draw upon its traditionally strong ties with the industrialized powers and the G77 in order to mediate an accord. Therefore, Canada organized the Group of Eleven (G11)--Australia, Austria, Canada, Denmark, Finland, Iceland, Ireland, New Zealand, Norway, Sweden and Switzerland. Led by Canada, the G11 hastily prepared amendments to Part XI of the draft negotiating text to serve as the basis for further negotiations.<sup>144</sup> Although the amendments did not address all the draft articles of concern to the United States, the G77 insisted that they were exhaustive. Negotiations centred on pioneer investment protection and amendments to executive council representation. However, neither issue was resolved to the satisfaction of the United States.

As proposed, the draft article on investment protection imposed onerous financial obligations on pioneer investors in exchange for guaranteed investment protection. In addition to the financial obligations contained in the draft text, the requirements for investment protection included: a five hundred thousand dollar payment upon registration; the accrual of a one million dollar annual fee payable upon approval of a plan of work; expenditures to meet diligence requirements established by the ISA; exploration of the

reserved area on a reimbursable basis; the training of personnel designated by the ISA; and, the mandatory transfer of technology prior to the convention's entry into force.<sup>145</sup> Because the draft article neglected to provide a clear definition of "pioneer investor" it afforded those states which were not true pioneer investors, India, Japan, the Soviet Union, the opportunity to claim pioneer investor status. Since the majority of pioneer investors were American, the draft article not only undermined the interests of the real pioneer investors, it undermined the interests of the United States. More importantly, the United States maintained that the imposing regime would discourage private investment in deep seabed mineral production. In the first place, a fundamental lack of certainty would exist with regard to the granting of mining contracts and the mandatory transfer of technology requirements. And, in the second place, the burdensome financial requirements would result in governments subsidizing private companies and/or operating state-owned industries.<sup>146</sup> In its present form, the draft article clearly discriminated against those it was supposed to protect--the pioneer investors.

The proposed amendment to the draft article on executive



council representation was equally unacceptable to the United States. The amendment granted the United States a permanent seat on the executive council. The seat, however, was tied to the United States' status as the world's foremost mineral consuming state. There was no recognition of the United States' preeminence in seabed mining technology and investments. Nor was there any recognition of the fact that the United States would be the ISA's principal financier. Of far greater concern to the United States was the status of the executive council. So long as the executive council was impotent, the permanent seat was irrelevant. The first priority of the United States was the transfer of decision-making power from the general assembly to the executive council. It was only when decision-making authority was vested in the executive council that the issue of permanent representation and weighted voting was of critical importance. Since the amendment failed to alter the status of the executive council, it was unacceptable to the United States.

The inadequacy of the changes and the G77's refusal to renegotiate the other substantive issues in Part XI caused the United States to conclude that all efforts to achieve consensus had been

exhausted. Achieving consensus on a single draft negotiating text from which a draft law of the sea convention could be derived had proven to be an impossibility. The United States, therefore, requested that the Conference vote on the adoption of the single draft negotiating text. The vote was held on April 30, 1982. The results were one hundred and thirty states in favour of adoption, four opposed, and seventeen abstentions.<sup>147</sup> As a result of the majority vote, the single draft negotiating text was transformed into the draft 1982 Law of the Sea Convention. Upon finalization, the draft Convention was opened for formal signature in Montego Bay, Jamaica on December 10, 1982.<sup>148</sup>

Although the draft Convention was adopted by an overwhelming majority, the economic importance of those voting no or abstaining is significant. Not only are they the states with the capacity to develop the deep seabed mining industry, they produce more than sixty percent of the world's gross national product and provide more than sixty percent of the financial contributions to the United Nations.<sup>149</sup> Without their support, implementing the Convention's deep seabed mining provisions (Part XI and Annexes three and four) would prove to be a formidable task. So, too, would bringing the

Convention into force.

## IX

### THE PREPARATORY COMMISSION

Prior to the dissolution of UNCLOS III, two resolutions were adopted as annexes to the Final Act of the Convention.<sup>150</sup> The first, Resolution I, provided for the establishment of the Preparatory Commission (PrepCom) to lay the foundation for the ISA and the Law of the Sea Tribunal which will begin operations when the convention comes into force.<sup>151</sup> Resolution II established preparatory investment protection for pioneer investors. Once pioneer investors have settled amongst themselves any disputes arising over overlapping site claims, the PrepCom is authorized to register their claims.<sup>152</sup> Together, the Resolutions represent an interim regime for deep seabed mining until the Convention enters into force.<sup>153</sup>

The PrepCom has held six relatively unproductive negotiating sessions since 1982. Under the terms of Resolution I, signatories to the Convention have full participation rights in the PrepCom's work and non-signatories enjoy observer status. However, the number of states represented at the sessions only range from eighty to one hundred.<sup>154</sup> Since the United States voted against the Convention, it

does not send representatives to the sessions. While Canada sends four delegates to the sessions, they maintain a very low profile.<sup>155</sup> When the low salience of the PrepCom's work is combined with the stagnating ratification process, it is evident that a significant number of states have lost interest in the Convention.

Contrary to Conference expectations, the Convention did not enter into force within five years of the official signing ceremony. By the end of 1990, only forty-four of the sixty required ratifications were on deposit with the Secretary General of the United Nations. Although the 1958 Geneva Conventions only required twenty-two ratifications, the final Convention did not enter into force until 1973. The slow ratification process is, therefore, not an unusual situation. There is one significant difference, however. The forty-four states which have ratified the 1982 Law of the Sea Convention are primarily smaller developing nations. Not only are the Western industrialized states and the countries of Eastern Europe entirely missing<sup>156</sup>, none of the land-based producers or the pioneer investor states have ratified. At the heart of the matter is deep seabed mining. Because of the prolonged negotiating process, deep seabed research and mining technology developed faster than

the new accord. As a result, the deep seabed mining provisions, in Part XI and Annexes three and four of the Convention have been eroded by time as well as technology. Since many of the Convention's provisions have been overtaken by time, they are simply inapplicable in the light of changed circumstances.<sup>158</sup> Hence, when the ISA's enormous financial costs are taken into consideration, the Convention is substantially less attractive than it was in 1982.

According to all projections, the costs of financing the ISA, the Enterprise, and the Law of the Sea Tribunal are horrendous. United Kingdom estimates indicate that at 1983 prices the fixed administrative costs for the United Kingdom would be between one point five and one point eight million pounds. Their estimated cost of financing the Enterprise would be between twenty-four and forty million pounds in interest free loans plus an equal amount in debt guarantees. And, because of the United States' withdrawal, the figures would have to be adjusted upwards by approximately thirty-three percent. The government of the United Kingdom has, therefore, determined that their national seabed mining companies would be discouraged from participating in deep seabed ventures.<sup>159</sup> Based on their research findings, the United Kingdom notified the Secretary

General of the United Nations that it will not be a party to the Convention. Similar declarations have been issued by the Federal Republic of Germany and the European Community, Japan, and a number of other states. While no such declaration has been issued by the Soviet Union neither has it ratified the Convention.

Because the financial costs are to be borne according to the United Nation's financing schedule, the absence of the wealthier states is significant. The closer the Convention gets to sixty ratifications, the greater the financial risk grows for the ratifying states.<sup>160</sup> Since the forty-four ratifying states, to date, represent only slightly more than two and one-half percent of the United Nations' financing schedule, the next eighteen states will have to bear the lion's share of the financing which would normally be born by the Western industrialized powers. If, for example, Canada were to ratify the Convention before the larger industrialized states, it would be liable to pay a disproportionately large share of the costs. On the scale of assessment for the United Nations' regular budget, Canada's assessment is three point zero eight percent. This means that Canada could end up paying one-third of the financing costs if the other fifty-nine states were all developing nations.<sup>162</sup>

Understandably, Canada has adopted a wait and see attitude.<sup>163</sup>

The conflict of interests in the PrepCom is not limited to the financing schedule. Deep divisions over all substantive issues have prevented the PrepCom from implementing Resolution I. The G77, the former group of Eastern European Socialist States, the EC, and other special interest groups are divided over the establishment, powers and functions of the Finance Committee; the desirability of establishing a compensation fund; the imposition of a production limitation formula; and, the implication of subsidies both with respect to the competitiveness of the Enterprise and the General Agreement on Trade Tariffs (GATT) regulations.<sup>164</sup> In other words, the conflicts at UNCLOS III were simply transferred to the PrepCom. The PrepCom is beset with the exact same concerns that precipitated the United States' withdrawal, Canada's diplomatic isolation, and the Conference's failure to achieve consensus. For the PrepCom to succeed, then, it will have to resolve the deep seabed mining issues of greatest importance to the United States and Canada.

After more than eight years of PrepCom negotiations, the structure of the Finance Committee has not been established. The



impediment to agreement is weighted voting. A growing number of delegates believe that states with the highest contributions to the administrative budget of the ISA should have a right to substantial representation on the Finance Committee. By the late 1980s there was a growing realization that both the Assembly and the ISA require the assistance and advisory expertise of a subsidiary organ on financial matters.<sup>165</sup> As a result, a subsidiary organ was appointed in 1990 to advise and assist the PrepCom's financial committee. The decision to enlist the aid of a subsidiary organ is clearly an indication of the G77's dramatic change in position. The United Nations, many of its subsidiary organs, and a number of other international organizations are founded on the principle of preferential voting rights. There can be little doubt, therefore, that the G77 is beginning to soften its position on the issue of equal representation.

Protection and compensation for land-based producers who experience a loss in exports and foreign exchange earnings<sup>166</sup> as a result of deep seabed mining is another contentious issue. While the production limitation formula, the compensation fund, and exemptions from revenue-sharing were designed to remedy the

situation, the provisions are seriously flawed. Under the terms of the Convention, seabed mineral production is limited to sixty percent of the increase in world demand for the first twenty-five years of production. The formula, however, is based on the prospective rate of increase in nickel consumption and offers no protection for the land-based producers of other minerals, particularly cobalt. Because of the admixture of manganese nodules, producing the lawful amount of nickel will not only wildly overproduce cobalt, it will seriously affect the price of cobalt.<sup>167</sup> A second conflict arises from the fact that land-based nickel producers are developed states, while land-based cobalt producers are developing states. The latter states argue, and rightly so, that the formula discriminates in favour of the wealthier nations. The land-based cobalt producers, therefore, insist that not only the formula be adjusted to reflect their interests but that they receive financial compensation for their anticipated losses.

Without specifically calling for a compensation fund, the Convention requires the ISA to establish a system of compensation or take other measures of economic adjustment assistance to aid the developing states which suffer serious adverse effects on their

export earnings or economies resulting from activities in the seabed area.<sup>168</sup> Because of the discriminatory nature of the production limitation formula, the G77 has placed great emphasis on the importance of establishing a compensation fund. But, a number of West European and other states maintain that the PrepCom's mandate requires that it must first establish whether or not a fund or other measures are required. Some argue that an economic environment in which seabed mining would be profitable would lead to increased, not decreased, profits for all land-based mineral producers. Still others, such as the EC, are of the opinion that as seabed mining will not be economically viable in the near future, it would be premature to recommend remedial measures at this time.<sup>169</sup> Since neither Australia nor Canada qualify for compensation, they argue that the fund would give their competitors an unfair marketing advantage. Whereas the developing nations argue that the production limitation formula discriminates in favour of the developed nations, the developed nations maintain that the compensation fund discriminates in favour of the developing nations. In effect, then, while both groups of land-based producers maintain that they will be disadvantaged states, others insist that it is too early to draw any

conclusions about the implications of deep seabed mining.

Not only are delegates divided over the implications and value of the compensation fund, they disagree on the source of financing. Some states are of the opinion that the financing should be derived solely from part of the profits of the Enterprise. Others insist that all seabed miners must be required to contribute a portion of their profits to the fund.<sup>170</sup> And, financing the fund raises the question of subsidization. Contributions to, and disbursements from, the fund are in effect subsidies. Therefore, a number of states, particularly the United States and Canada, argue that the fund would be a violation of the GATT rules and regulations. They maintain that subsidies not only afford protection to land-based producers, they offer an unfair advantage in deep seabed mining. The result might well be a loss in competitiveness and revenues for the Enterprise and private investors. As a result, a number of delegates have concluded that the production limitation formula, the compensation fund, and the revenue-sharing exemptions contravene GATT provisions and cannot be implemented.<sup>171</sup>

A similar conflict exists between the mandatory transfer of technology provision and national security interests. Article 302 of

the Convention provides that states are not required to disclose information which is contrary to the essential interests of their security. Since there is a direct relationship between seabed technology and military research and development, Article 302 overrides the mandatory transfer of technology provision. So long as Article 302 is invoked, the ISA would be prohibited from denying licences to those states refusing to comply with the mandatory transfer of technology requirements. While the G77 is attempting to plug the loophole, there is a general agreement among delegates that Article 302 is warranted for national security interests. With Article 302 considered a *sine quo non*<sup>172</sup>, the G77's attempts to implement the mandatory transfer of technology provision are undermined. So, too, is the G77's vision of a new world economic order arising out of deep seabed mining.

Despite waning interest in the substantive issues of deep seabed mining, the PrepCom has succeeded in implementing Resolution II. However, Resolution II has been circumscribed by unilateralism, time, and changed circumstances. Unilateralism began in earnest on March 10, 1983. On that date, the President of the United States declared that while the United States is prepared to accept and act

in accordance with the balance of interests relating to the conventional uses of the oceans, it will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction.<sup>173</sup> According to the presidential statement, deep seabed mining remains a lawful exercise of the freedom of the seas open to all nations. The United States would, therefore, continue to allow its firms to explore for, and when the market permits, to exploit deep seabed minerals.<sup>174</sup> Shortly thereafter, in 1984, the United States Department of Commerce issued four licences authorizing deep seabed mineral exploration in specific areas of the east-central Pacific Ocean.<sup>175</sup> The Secretary General of the United Nations received formal notification that the licensees and their vessels were operating under the sole jurisdiction of the United States and that "in the exercise of the high seas freedom to engage in exploration for, and commercial recovery of, hard mineral resources of the deep seabed, it was the international legal obligation of all states to avoid unreasonable interference with the interests of other states."<sup>176</sup> Similar licences and declarations were issued by the United Kingdom, the FRG, and the Soviet Union.

Nonetheless, the Soviet Union declared that its unilateral action was precipitated by the need to protect its interests from the Western capitalists. Of course, since there was no legal status under the Convention which has not entered into force, whether or not the actions can be considered unilateral or illegal is debatable.

While the G77 criticized the actions as illegal unilateralism, PrepCom reaction was mixed. On August 30, 1985 and again on April 11, 1986, the PrepCom issued declarations rejecting any claims or actions incompatible with the Convention on the grounds that they are illegal and devoid of any basis of legal rights. However, a number of delegates refused to participate in the declarations of condemnation because of uncertainty about both the substance and effect of the declarations.<sup>177</sup> Whether or not PrepCom consensus on the declarations of condemnation would have influenced the licensing practices of individual states is not clear. However, it is clear that the issuing of deep seabed mining licences by individual states has profound implications for the ISA.

Had the PrepCom been able to register pioneer investors in 1982 or 1983, it might have prevented the industrialized states from gaining the upper hand. As it was, the need to resolve overlapping

site claims caused a five year delay in the licensing of pioneer investors. Under the terms of Resolution II, the successful registration of pioneer investor sites presupposes an undisputed area that does not overlap the site claims of competitors. All parties are, therefore, compelled to settle their site disputes prior to applying to the PrepCom for registration. Dispute resolution was complicated by the fact that the interests of the majority of investors, who had already invested more than thirty million dollars (US) in exploration of the ocean floor<sup>178</sup>, were concentrated in the Clarion-Clipperton area of the east-central Pacific ocean. To compound further the problem, there were two separate and distinct groups with overlapping claims both within and between groups.

Group one consisted of the state enterprises--France, India, Japan, and the Soviet Union--which were seeking pioneer status under the ISA. Group two was comprised of private companies from eight Western states--Belgium, France, Italy, Japan, the FRG, the Netherlands, the United Kingdom, and the United States--which had come together in four consortia. Unlike the state enterprises, the consortia were not seeking PrepCom licences nor were they encumbered by state bureaucracy. Consequently, they arrived at a



provisional understanding on August 3, 1984.<sup>179</sup> The provisional understanding facilitated the issuing of licences by the United States, the United Kingdom and the FRG. The state enterprises, however, did not conclude a balance of interests agreement until February, 1986.<sup>180</sup> As a result, the state enterprises submitted their site claims to the PrepCom on March 25, 1987, more than a year after the final date for registration had expired.<sup>181</sup> Since Resolution II was no longer in effect, the PrepCom lacked the legal authority to register the claims. An amendment to Resolution II was, therefore, necessitated. Under the terms of the amendment, the registration period for pioneer investor status is extended until the Convention enters into force. This means that any state wishing to claim pioneer status, whether it has a prior claim or not, is now able to do so. Rather than affording protection to the true pioneer investors, the amendment gives the PrepCom a blank endorsement to issue seabed mining licences. The amendment did, however, expedite an accord between the four state enterprises and the consortia. On August 4, 1987, the two groups signed The Agreement on the Resolution of Practical Problems with Respect to Deep Seabed Mining Areas. With the mechanism for resolving conflicts on overlapping

site claims, the PrepCom was finally able to register pioneer investors.

The first state to receive pioneer investor status was India. Under the terms of registration, India was granted an undisputed exploration field of approximately seventy-five thousand square kilometres in the Indian Ocean. Shortly thereafter, France, Japan, and the Soviet Union were granted equal areas in the Pacific Ocean. However, the licences are for exploration purposes only. Production authorization is withheld until the Convention enters into force and until these states deposit ratifications with the Secretary General of the United Nations. In the meantime, the ISA has acquired jurisdiction over seventy-five thousand square kilometres of the Indian Ocean and two hundred and twenty-five thousand square kilometres of the Pacific Ocean. And, with payment of the five hundred thousand dollar registration fee by each of the pioneer investor states, the ISA has acquired its own finances.

The importance of these achievements, of course, rests on the ability of the PrepCom to implement Resolution I. Unless Resolution I is implemented, the Convention will not enter into force and until the Convention enters into force the pioneer investors cannot exploit

their deep seabed mining sites. The same does not hold for the four private consortia however. They are free to exploit their mining sites whenever the market is conducive. Hence, unless the Convention enters into force, the PrepCom will have served the interests of the industrialized powers rather than the interests of the signatories to the Convention. Because of the provision for mandatory resolution of overlapping site claims, the state enterprises were forced to conclude an accord with the private consortia. As a result of the accord, the private consortia now have the mechanism for conflict resolution. In effect, then, the PrepCom not only facilitated the drafting of an accord but the implementation of an accord outside both the law of the sea negotiations and the ISA's authority. Since it is the members of the four private consortia who are the true pioneer investors, it is perhaps fitting that they should reap the greatest benefits from Resolution II.

Although a significant achievement, the successful registration of pioneer investors has had no effect on the ratification process. Even the pioneer investor states have notified the Secretary General of the United Nations that they will not ratify the Convention unless Part XI and Annexes three and four are renegotiated. The PrepCom,

however, maintains that it is mandated to implement, not to renegotiate, the Convention's deep seabed mining provisions. The belief that in time and before the coming into force of the Convention substantial renegotiation of Part XI and Annexes three and four will be possible is, therefore, illusory.<sup>182</sup> This argument notwithstanding, there are indications that major changes in the international political climate are beginning to have a positive impact on PrepCom negotiations

For the first time ever, delegates have acknowledged the futility of attempting to negotiate a universal convention without universal participation.<sup>183</sup> On September 1, 1989, the G77 and other special interest groups actually supported a series of statements advocating universal participation in the Convention. In endorsing the statements, the G77 indicated a willingness to hold discussions with any delegation or group of delegations, whether signatories to the Convention or not, without any preconditions other than that all parties assume a positive approach to serious and meaningful talks. Then, in 1990, the Secretary General of the United Nations initiated a series of informal consultations aimed at achieving universal participation in the 1982 Law of the Sea Convention. In so doing, the

Secretary General identified the Convention's deep seabed mining provisions as the major impediment to universal participation. Noting that, in the eight years since the Convention was adopted, significant changes have occurred in the international political climate and in deep seabed mining interest, he urged the international community to take these factors into account. Unless the problems with the Convention's deep seabed mining provisions are addressed from the perspective of changed circumstances, the Secretary General expressed the view that opposing states would neither ratify nor accede to the Convention.

The changing attitudes in the PrepCom, particularly in the G77, and the new initiative of the Secretary General indicate a growing awareness of the fact that the Convention's deep seabed mining provisions have been overtaken by time. Since the dissolution of UNCLOS III, manganese nodules have been discovered in the EEZ and continental shelf areas of Chile, France, Mexico, the United States<sup>184</sup>, and undoubtedly a number of other states. With the discovery of shallower- water manganese nodules, interest in deep seabed mining has declined. Compared to deep seabed mining, the problems, costs, and risks involved in shallower-water mining are substantially

lower. Shallower-water mining technology is far more advanced than deep seabed mining technology. And, because of logistics, the staffing, transportation, risk and financial costs of shallower-water mining are far more advantageous than for deep seabed mining. Therefore, capital and insurance are not only more readily available, the financing rates are much lower. As a result, the locus of attention has shifted from the deep seabed to the EEZ and the continental shelf. An agreement has already been concluded between Mexico and an American firm to exploit the mineral resources in Mexico's EEZ. As a result of these developments, the most contentious provisions in Part XI and Annexes three and four of the Convention are now redundant. Canada's hopes of implementing a production limitation formula have been dashed. To limit production in the international area would simply mean limiting the ISA out of production.<sup>185</sup> Since there can be no compensation for production under national jurisdiction, which might equal affect prices and make it impossible to determine what is affecting what<sup>186</sup>, the compensation fund is undermined. Not only is the mandatory transfer of technology provision circumvented by Article 302, it cannot be applied to production in areas under national jurisdiction. And, so

long as production is centred in areas under national jurisdiction, the parallel mining system will not be implemented. When the costs and risks involved in mining shallower water nodules are compared with those associated with mining the deep seabed, the parallel mining system loses its appeal. The future of the ISA is, therefore, tenuous.

The problems associated with defining the outer limits of the continental shelf are a further impediment to the ISA. Although the Convention provides technical criteria for delimitation of the continental shelf where it extends beyond the two hundred metre limit, the majority of coastal states still adhere to the 1958 Geneva Convention. Large areas of the continental shelf, and the EEZ, are either inadequately surveyed or not surveyed at all.<sup>187</sup> The majority of coastal states have neither the capability nor the capital to acquire the geophysical and geological data required for a scientific survey.<sup>188</sup> And, with the discovery of shallower water manganese nodules, there is no incentive for them to define and/or limit the areas under national jurisdiction. As a consequence, the boundaries of the international seabed area have not been determined. In effect, since there is no international area for the ISA to govern, there is no

purpose in bringing the ISA into force. The reality is that because of the protracted negotiating process, the Convention's deep seabed mining provisions have been overtaken by time and changed circumstances. So, too, has the PrepCom's mandate.

Time has run out for the PrepCom. Its mandate expires at the end of 1991. Unless the delegates follow through with the initiatives undertaken by the Secretary General, the deadline should not be extended. Time has proven the Convention's deep seabed mining provisions not only unrealistic but unworkable. The Convention must, therefore, be amended. The argument that the PrepCom is not mandated to amend the Convention is invalid. The PrepCom is mandated to implement Part XI and Annexes three and four of the Convention. If implementation requires an amendment then renegotiations must occur. Resolution II has been amended and/or renegotiated twice. In 1987 the PrepCom amended the registration deadline for pioneer investor site claims. And in 1990, the PrepCom waived the annual fixed fee of \$US one million for France, Japan and the Soviet Union in exchange for technology transfers to the Enterprise and the training of Enterprise personnel. However, Annex three of the Convention provides for the annual fixed



fee of \$US, one million (Article 13), the transfer of technology (Article 5), and the training of Enterprise personnel (Article 15). The Convention does not provide for the exchange of one provision for another. Clearly, then, if implementing Part XI and Annexes three and four requires an amendment and/or renegotiation, the precedent has already been set. The future of the 1982 Law of the Sea Convention is dependent upon recognition of this reality and so, too, is the future of the PrepCom.

## X CONCLUSION

In the eighteen years since UNCLOS III was convened, world interest in deep seabed mining has waned. Time has proved Ambassador Pardo's predictions wrong. World demand for mineral resources has not increased; it has significantly decreased. According to the 1988 World Bank report, the growth in demand for key metals of the deep seabed in the 1990s will be lower still than that experienced in the 1970s and 1980s.<sup>189</sup> The report is consistent with the results of a survey released by Australia in 1985. Because of the decreasing demand for world minerals, the survey found that aggregate metal prices would at least have to double for deep seabed mining to be economically viable. Even if mineral prices were to rise significantly the volume of output, especially of cobalt and nickel, would have a negative impact on the world market. Not only would prices decrease, it is doubtful if all the output could be sold.<sup>190</sup> While the deep seabed remains a future source of minerals, the great wealth envisaged from deep seabed mining has not materialized. And, based on the projected rate of growth in world demand, deep seabed mining is unlikely to occur before the latter

half of the Twenty-First Century.

The unfavourable prospects of deep seabed mining has shifted the focus of attention back to the areas of the seabed under national jurisdiction. The discovery of shallower-water manganese nodules and the continuing demand for off-shore petroleum resources have precipitated an increase in national boundary disputes. According to the latest United Nations' estimates, there are three hundred, or more, boundary disputes between coastal states with adjacent or opposite coastlines. Predictably, the number of disputes will increase proportionately with the discovery of EEZ and continental shelf mineral resources. Also predictable is a resurgence of interest in the exploitability clause of the 1958 Geneva Convention on the Continental Shelf. Combined, the decreased value in deep seabed mining, the discovery of shallower water manganese nodules, and the continuing demand for off-shore petroleum will motivate coastal states to extend, not limit, their national jurisdiction.

The law of the sea has developed through the unilateral actions of coastal states. Historically, coastal states have sought to extend their national sovereignty whenever it was in their best economic interest. It is, therefore, predictable that coastal states will

attempt to absorb the EEZ and the continental shelf into their territorial seas. If historic precedent prevails, the resultant dispute between coastal and maritime states will precipitate the convening of UNCLOS IV. Since the common heritage of mankind, with respect to seabed resources, will not be in the best national economic interest of coastal states, the implications for deep seabed mining are twofold. First, the locus of seabed mining will be in the area of the seabed under national jurisdiction. National interests will determine the degree to which the industry is developed. Bilateral agreements will be negotiated between coastal states and state or private enterprises with the technology and the capital to develop the industry. The new world economic order envisaged by the G77 will only be realized by developing coastal states with mineral resources in their national seabed areas. At least, it is to be assumed that the mandatory transfer of technology would be a precondition of bilateral or joint-venture agreements. While the other developing nations might still share in the development of the deep seabed mining industry, they will have to adopt a market mentality.

Second, Part XI and Annexes three and four of the 1982 Law of

the Sea Convention will be renegotiated. The structure and financing of the ISA, the production limitation formula, the compensation fund, the mandatory transfer of technology, the Trustee Zone and the parallel mining system are impediments to defining the boundaries of the international area. If they are not removed, the deep seabed industry will be developed under the freedom of the seas doctrine. Because of the tremendous cost and risk involved, large-scale commercial development projects are the only economically viable means of exploiting the deep seabed's mineral resources. The future of the common heritage of mankind principle is, therefore, dependent upon the adoption of a joint-venture system.

As proposed by Canada in 1973, a joint-venture system, based on revenue sharing not production, would ensure that the interests of all parties are protected. Not only would the deterrent to private investment be removed, the future of the ISA would be secured. Since the function of the ISA would be restricted to issuing deep seabed mining licences, resolving disputes and transferring profits to the poorer nations, there would be no need for a powerful supranational authority. The developing nations would share in the benefits of deep seabed mining, and the interests of those with the

capacity to develop the industry would be protected.

Of course, these predictions are purely speculative. It is not possible to know whether or not coastal states will once again challenge the conventional uses of the sea or if UNCLOS IV will be convened. It is possible, however, to predict that the 1982 Law of the Sea Convention will not enter into force unless Part XI and Annexes three and four are renegotiated. While it is possible to bring the Convention into force without implementing the deep seabed mining provisions it is doubtful if the industrialized states would participate. So long as the provisions remain in the Convention, there is no guarantee that implementation would not occur at some future date. Renegotiation of Part XI and Annexes three and four, not dormancy, is the key to ratification of the 1982 Law of the Sea Convention.

What, then, are the implications for the United States' and Canada's law of the sea interests. Are the developments in the 1982 Law of the Sea Convention, with respect to codification and ratification, consistent with the United States' and Canada's objectives? And, if so, have the United States and Canada attained their law of the sea goals?

Protecting its national strategic and national economic interests were the United States' fundamental law of the sea goals. Since the United States' goals were directly dependent upon the freedom of the seas doctrine, its two principal objectives in the law of the sea negotiations were: one, limiting the extension of coastal state sovereignty; and two, limiting the power and authority of the ISA. The prolonged negotiating process, however, gave rise to a third objective. This was to ensure that the conflict over deep seabed mining did not undermine an accord on the conventional uses of the sea.

With the twelve-mile territorial sea and the two hundred-mile EEZ entrenched in customary international law, the United States has achieved its principal law of the sea goal. The freedom of navigation through international straits, the EEZ, and the superjacent waters of the continental shelf are protected by international law. In recognition of this achievement, the United States joined forces with the Soviet Union in issuing a joint statement on the conventional uses of the sea. On September 23, 1989, the United States and the Soviet Union declared *inter alia* that they are guided by the provisions of the 1982 United Nations Convention on the Law

of the Sea with respect to the conventional uses of the sea. In calculating that coastal states would compromise their national sovereignty and national security interests in exchange for economic concessions, the United States was able to secure its goal and, at the same time, reject the Convention!

While the primacy of national strategic interests is not denied, there was a hidden agenda behind the United States' economic concessions to coastal states. As the world's foremost coastal state, economic concessions were also in the best national economic interest of the United States. In fact, it is quite probable that the United States gained more from the concessions than any other coastal state. With the passage of the twelve-mile territorial sea and the two hundred-mile EEZ into customary international law, the United States acquired jurisdiction over a tremendous accretion of territory. The extent of the acquisition is evident in the policy statements issued by the United States in 1983 and 1988. On March 10, 1983, the United States claimed sovereignty and jurisdiction over a two hundred-mile EEZ. The claim, however, was not limited to the continental United States. Noting that the recently discovered nodule deposits are a significant future source of strategic



minerals, the United States declared sovereign rights and jurisdiction over a two hundred-mile EEZ contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and all the United States' overseas territories and possessions.<sup>191</sup> Then, in accordance with international law, the United States extended its territorial sea to twelve miles on December 27, 1988. At the same time, the United States claimed a twelve mile territorial sea for Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and any other territory and possession over which the United States exercises sovereignty.<sup>192</sup>

With this massive accretion of territory, the discovery of shallower water manganese nodules is of profound significance to the United States' national economic interests. Having secured a future source of strategic materials, access to deep seabed minerals is no longer of critical importance to the United States. In effect, the United States created a win-win situation for itself. Proffering economic concessions to coastal states enabled the United States not only to protect its national strategic interests but to protect its national economic interests as well. This, of course, was the United

States' second law of the sea goal. The United States' national economic interest is best protected by the free market system. Since the establishment of a powerful supranational organization would interfere with market forces, the United States had to ensure that the jurisdiction of the ISA was limited. Although singularly unsuccessful in achieving its objective in the law of the sea negotiations the United States has, nonetheless, attained its goal. The discovery of manganese nodules in areas under national jurisdiction, the decline in world demand for mineral resources, and dramatic changes in the international political climate have undermined the Convention's deep seabed mining provisions. As a result, the PrepCom is dead-locked and the ratification process is stagnating. Even if by some remote chance the 1982 Law of the Sea Convention enters into force, the deep seabed mining provisions will not be implemented. The exploitation of seabed minerals in areas under national jurisdiction precludes the introduction of the production limitation formula and the compensation fund. Since the production limitation formula does not apply to areas under national jurisdiction, implementing it would simply result in limiting the Enterprise out of production. And, there can be no compensation for

production in areas under national jurisdiction. The ISA is not mandated to compensate land-based producers for disruptions caused by seabed mineral production under national jurisdiction. Deep seabed mineral production will, as the United States advocated, be treated on the same basis as land-based mineral production.

The dramatic changes in the international political climate are also a major factor in the United States achieving its second law of the sea goal. The Soviet Union and the countries of Eastern Europe, except for Romania, either voted against the 1982 Law of the Sea Convention, abstained or declared the Convention non-ratifiable because of the deep seabed mining provisions. Most of these states as well as China, the newly industrialized countries of Asia, and a number of South and Central American states have now adopted market mentalities. In the process they have, or are attempting to, forged stronger ties with the Western industrialized states, particularly the United States. Concomitant with these changes, a number of PrepCom delegates are now of the opinion that the structure, decision-making authority, and voting rights in the ISA must reflect the interests of the highest financial contributors. This change in position reflects a significant loss of support for the G77.

The ISA, as envisaged by the G77, will not enter into force. The new East-West alliance makes it a certainty that if the ISA enters into force, it will be modelled along the lines of other international organizations, such as the IMF or the World Bank. As proposed in the United States' draft law of the sea treaty, the jurisdiction of the ISA will be limited.

With the jurisdiction of the ISA limited, the United States has achieved its second law of the sea goal, which was to protect its national economic interest. However, this achievement is a result of the overwhelming success of the United States' third objective, not its second. The United States failed to achieve its second objective. Despite sweeping concessions to the G77 and the land-based producer states, the United States was unable to prevent the establishment of a powerful supranational authority. Nor was the United States able to effect significant changes to Part XI and Annexes three and four of the Convention. The deep seabed mining provisions in the single draft negotiating text and, therefore, the 1982 Law of the Sea Convention are anathema to the United States. As a result, the United States abandoned its second negotiating objective and focused on its third objective.

The United States' third objective was to ensure that the conflict over deep seabed mining did not undermine the accord on the conventional uses of the sea. After eight years of negotiations, the United States had two options. It could either continue with the fruitless negotiations or it could withdraw. Taking a one-year sabbatical from negotiations enabled the United States to conduct a comprehensive inter-agency review prior to exercising one of the options. The review clearly indicated that the latter option was in the best national strategic interest of the United States. By 1982 it was evident that the twelve-mile territorial sea and the two hundred-mile EEZ were, or soon would be, customary international law. Hence, with or without a new law of the sea convention, the freedom of navigation through international straits was secured. With its national security interests protected and the world-demand for mineral resources declining, the United States concluded that there was no longer an urgent need for a new law of the sea convention. Therefore, the United States demanded a vote on the adoption of the single draft negotiating text. In so doing, the United States was acutely aware that the text would be adopted by a majority vote. However, it was also aware that the majority vote

would have no bearing on the ratification of the Convention. So long as the deep seabed mining provisions remained in the text, the industrialized powers would never ratify. And, without the financial contributions of the industrialized powers, other states, whether they supported the deep seabed mining provisions or not, would not be party to the Convention.

The United States' greatest ally in the law of the sea negotiations was time. Because of the prolonged negotiations, the Convention's deep seabed mining provisions have been overtaken by time. With the passage of time shallower water manganese nodules were discovered, the world demand for mineral resources declined, and dramatic changes in the international political climate occurred. As a result, the international community has not only lost interest in deep seabed mining, it has concluded that the industry must be developed under the market system. Consistent with these developments, the PrepCom has come to the realization that a universal law of the sea accord cannot be achieved without universal participation. Time has clearly favoured the United States. In securing its third objective the United States achieved its second as well as its first law of the sea goal. The United States protected its

national security and national economic interests by ensuring that the jurisdiction of coastal states and the supranational authority were limited. And, it is not insignificant that the United States achieved its law of the sea goals without having to be party to a new law of the sea convention!

Canada's record of achievement in the law of the sea negotiations is more ambiguous than that of the United States. While Canada has not achieved its goals, it has enjoyed partial success. Like the United States, Canada had two law of the sea goals. First and foremost, Canada sought to protect its national sovereignty interests. Canadian sovereignty over the entire continental shelf, the archipelagic waters of the Arctic, particularly the Northwest Passage; the twelve-mile territorial sea; and, after 1973, the two hundred-mile EEZ were critical to Canada's national oceans policy and national economic interests. Canada's principal objective in the law of the sea negotiations was to extend and/or protect coastal state jurisdiction. Canada's second law of the sea goal was to protect its national economic interest from the uncontrolled exploitation of deep seabed minerals, particularly nickel. Canada's second objective in the law of the sea negotiations

was to ensure the establishment of a powerful supranational seabed mining authority.

With the passage of the twelve-mile territorial sea and the two hundred-mile EEZ into customary international law; coastal state jurisdiction over the exploitation of continental shelf mineral resources; Convention provisions for ice-covered areas; Canada's unique interpretation of the Convention's freedom of navigation provisions; the allocation of four executive council seats to land-based mineral producers; the production limitation formula; and, the creation of a powerful supranational seabed mining authority, Canada's achievements appear quite impressive. However, an analysis of these and countervailing Convention provisions indicates that Canada's achievements are considerably more modest. While the passage of time and changed circumstances have been advantageous to Canada, they have also undermined Canada's goals.

Adoption of the twelve-mile territorial sea and the two hundred-mile EEZ was of vital importance to Canada. Canada's unilateral extension of the territorial sea has acquired legal status. And, because of Canada's indented coastline and island portions, using straight baselines to measure the new area substantially increases



Canada's sovereignty. However, the extensions fall short of establishing or protecting Canada's sovereignty over the archipelago waters of the Arctic. Although Canada claims that the freedom of navigation does not apply to the Northwest Passage because it has not been traditionally used for international navigation, this does not appear to be the case. The "traditional use" clause does not appear in the Convention. Nor does the Convention distinguish between internal and international straits. It simply provides for the freedom of navigation through straits used for international purposes. Foreign-owned vessels, therefore, appear to have the legal right to use the Northwest Passage for international purposes whether or not it is "traditionally used" as an international strait. In the event of an international dispute it is doubtful if Canada's unique interpretation of the Convention would be accepted by the International Court of Justice. To do so could precipitate a host of international disputes and, thereby, undermine the Convention.

Since the continental shelves of most coastal states extend less than two hundred miles seaward, their national sovereignty interests are protected by the two hundred-mile EEZ. They not only retain sovereignty over the mineral resources of the continental

shelf, they acquire a two hundred-mile exclusive fisheries zone. And, if the Convention enters into force, the developing coastal states will share in the Trustee Zone profits of the broad-margin states. This is not the case for Canada, however. In order for Canada to acquire jurisdiction over a two hundred-mile fisheries zone it must relinquish sovereignty over four hundred or more miles of continental shelf. And, it must contribute seven percent of the Trustee Zone profits to the ISA for distribution to its competitors. Despite Canada's insistence that the final Convention recognize coastal state sovereignty over the entire continental shelf, it fails to do so. The Convention only grants coastal states jurisdiction over the exploration and exploitation of continental shelf resources. Since jurisdiction is a far cry from sovereignty, it is a major deterrent to Canada's ratifying the Convention.

A second deterrent to Canada's ratification is the Convention's provision for ice-covered areas. Again, although Canada maintains that the Arctic Waters Pollution Prevention Act is protected by the provision, it is not. Under the terms of the Convention, coastal states have the right to establish and enforce non-discriminatory pollution controls in vulnerable and/or ice-covered areas of their

EEZ. The provision does not apply to areas outside coastal state jurisdiction. Since Canada has not established sovereignty over the archipelagic waters of the Arctic, particularly the Northwest Passage, there is no legal basis for Canada to claim an Arctic waters EEZ. Ergo, without an Arctic EEZ Canada cannot apply, let alone enforce, the Arctic Waters Pollution Prevention Act. The only way that Canada can establish Arctic sovereignty is through cooperation with the United States or dispute resolution. The issue of dispute resolution, however, gives rise to another conflict for Canada.

Under Canadian legislation all disputes relating to pollution, conservation and exploitation in Canada's coastal waters are not justiciable before the international court. Not only is the legislation an impediment to resolution of the Arctic dispute, it is a direct violation of the 1982 Law of the Sea Convention. Since the Convention provides for compulsory dispute resolution, Canada will either have to amend the legislation or remain outside the Convention. This is not the only Convention conflict posed by the Arctic Waters Pollution Prevention Act. By virtue of the 1970 amendment to the Canada Shipping Act, the Arctic Waters Pollution Prevention Act is extended to Canada's two hundred-mile EEZ. Under

the terms of the Convention, however, coastal states have no jurisdiction over pollution setting standards in the EEZ. With the EEZ enshrined in international law, Canada must amend the legislation whether the Convention enters into force or not.

Ironically, then, while Canada was remarkably successful in achieving its objective of extended coastal state jurisdiction, it fell short of achieving its principal law of the sea goal. On the one hand, the twelve-mile territorial sea and the two hundred-mile EEZ are consistent with Canada's goal. On the other hand, coastal state sovereignty over the entire continental shelf, Canadian sovereignty over the archipelago waters of the Arctic, the status of the Northwest Passage, and the Arctic Waters Pollution Prevention Act are circumscribed by the Convention. It is, therefore, in Canada's best national sovereignty interests to remain outside the Convention. In so doing, Canada can continue to found its national oceans policy on the 1958 Geneva Convention on the Continental Shelf. This will enable Canada to combine the territorial sea, the EEZ, and the exploitability clause in the 1958 Geneva Convention on the continental shelf. However, while this will substantially extend Canada's coastal state sovereignty, it will not establish Canada's

sovereignty over the Arctic or protect the Northwest Passage or the Arctic Waters Pollution Prevention Act. But, neither will ratifying the Convention.

A similar situation exists with Canada's interests in deep seabed mining. While Canada failed to achieve its goal of protecting its national economic interest, it achieved its objective in the law of the sea negotiations. This latter achievement, however, has been eroded by time and changed circumstances. Unlike the United States, Canada had a conflict of interest in deep seabed mining. Canada is both a land-based mineral producer and an industrialized state with the capacity to develop the deep seabed mining industry. Therefore, Canada sought to protect its national economic interests from the uncontrolled exploitation of deep seabed minerals while at the same time securing access to deep seabed minerals. Because of this conflict, Canada sought the establishment of a supranational authority with the power to limit and regulate the production of deep seabed minerals, particularly nickel. At the same time, however, Canada did not want the supranational authority to have the power to interfere with, or impair, its interests as an industrialized state and a future developer of the deep seabed mining industry. As envisaged

by Canada, the ISA would function primarily as a licensing agency. The ISA would issue non-discriminatory licences on the basis of a production limitation formula. The production limitation formula would provide for the phasing-in of deep seabed mineral, particularly nickel, production over an extended period of time. In this way, the dislocation of land-based mineral production would be prevented and Canada's national economic interest would be protected.

To Canada's credit, the production limitation formula is entrenched in the Convention. Although production is not phased in, as Canada had hoped, it is limited to sixty percent of the increase in world demand for nickel during the first twenty-five years of production. This is a remarkable achievement considering that by 1981 neither the industrial nor the developing nations supported the formula. A second major achievement for Canada is the allocation of four permanent executive council seats to land-based mineral producers. With this provision entrenched in the Convention, land-based mineral producers are guaranteed representation on Council. When these achievements are combined with the profound powers of the ISA, it is clear that Canada more than realized its objective in the deep seabed mining negotiations. Countervailing Convention

provisions and external developments, however, have rendered the objective ineffective in protecting Canada's national economic interest.

Although the Convention does not specifically provide for the establishment of a compensation fund, it requires the ISA to compensate developing nations, which are land-based mineral producers, for losses incurred from deep seabed mineral production. The Convention further provides that developing nations, which are net importers of deep seabed minerals, are exempt from revenue sharing in the Trustee Zone. Since Canada is neither a developing nation nor a net importer of deep seabed minerals, it is exempted from the provisions. Canada contends that the provisions discriminate against land-based producers which are developed states. Subsidizing Canada's competitors not only gives them an unfair price advantage, it encourages them to engage in unfair trade practices. So long as the developing nations will be compensated for their losses, there is nothing to prevent them from selling their minerals below market price. Canada, along with the other industrialized states, therefore, maintains that the compensation fund and the revenue-sharing exemption are violations of the Gatt

and cannot be implemented. (Curiously, Canada does not view the production limitation formula from the same perspective.) As such, they are an impediment to Canada's ratification of the Convention.

A second impediment to Canada ratifying the Convention is the financing arrangements for the ISA and the Enterprise, a third is the structure of the ISA, and a fourth is the mandatory transfer of technology provision. Not only are the costs of financing the ISA and the Enterprise onerous but the non-participation of the industrialized powers means that Canada could be responsible for thirty percent, or more of the bill. Canada would not, however, be responsible for thirty percent of the decision-making authority or voting power. Although land-based producers have four permanent seats on the executive council, the executive council is impotent. Decision-making power resides with the general assembly which operates on the principal of one nation, one vote. Hence, if Canada ratifies the Convention, it will bear the lion's share of the costs while the developing nations bear the lion's share of decision-making and voting power. This is particularly significant in view of the mandatory transfer of technology provision and Canada's interests in



developing the deep seabed mining industry. Unless Canadian companies transfer their mining technology to the ISA they will not be issued licences. For this reason, Inco and Noranda mines applied to the United States for licensing. Since Canadian companies are obviously determined to avoid the ISA's regulations, Canada's only hope of becoming a deep seabed mining state is through the establishment of a state-run enterprise. However, Canada does not have the capital for such a venture. This poses a rather interesting situation. If Canada ratifies the Convention, it will be responsible for one-third of the ISA's financial costs, will have no voting or decision-making power and will not even be a deep seabed mining state. In effect, because of the disproportionate sharing of the financial costs, Canada will be subsidizing the deep seabed mining activities of the developing nations. Clearly, then, ratifying the Convention would undermine, not protect, Canada's national economic interests.

Of course, Canada's national economic interests are not protected by remaining outside of the Convention either. If sixty other states ratify the Convention, it will enter into force. While Canada will not be bound by the terms of the Convention neither will

it be able to prevent the compensation fund from providing an unfair advantage to its competitors. At the same time, with or without the Convention, Canada will have to contend with the production of seabed minerals in areas under national jurisdiction. Not only has the discovery of shallower-water manganese nodules undermined the Convention, it has undermined Canada's second law of the sea goal. Limitations on the production of nickel will be determined by market forces not a supranational organization. If, as, and when conditions warrant, seabed mining will be developed under the free market system. Canada will have to adopt new production and marketing strategies if its land-based mining industry is to remain competitive.

This, of course, is the same reality facing the PrepCom. The market system cannot be artificially controlled by a supranational seabed authority. Time ensures that the market system is self-regulating. Time facilitates scientific research, technological advances, shifts in world demand, and changes in the international political climate. Whether driven by strategic, economic, or other interests, new forces evolve. Old market forces become outmoded. This is why the 1982 Law of the Sea Convention will not enter into

force. Many of the provisions, contained in Part XI and Annexes three and four of the Convention, have been eroded by time. Even had the Convention entered into force in 1975, as anticipated, the deep seabed mining provisions would have been obsolete by the mid-1980s.

What, then, is the future of the 1982 Law of the Sea Convention? With the passage of the twelve-mile territorial sea and the two hundred-mile EEZ into customary international law, the need for a convention on the conventional uses of the sea is precluded. And, because of time and changed circumstances, the Convention's deep seabed mining provisions are redundant. Therefore, the 1982 Law of the Sea Convention will not be implemented.

The law of the sea is a constantly evolving system which must have the flexibility to keep pace with science and technology. The inherent relationship between science and technology and the law of the sea is historic. Scientific and technological discoveries increased the uses of the sea, raised the seabed from obscurity, and precipitated the division of the sea into zones. It is, therefore, predictable that, in time, scientific and technological advances will necessitate the convening of UNCLOS IV. It is also predictable that

the delegates to UNCLOS IV will attempt to manipulate the law of the sea to their advantage. The progressive development of the law of the sea will once again be undermined by states seeking to protect their perceived national interests from advances in science and technology. On the other hand, given the dramatic changes in the international political climate, it is possible that UNCLOS IV will produce a law of the sea convention which uses scientific and technological advances for the common benefit of mankind.

## ENDNOTES

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<sup>21</sup>Augur, Robert. "Prelude to a Finale Provided by Single Negotiating Text", International Perspectives, July/August, 1975. p. 34.

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\*These developments were accurately predicted by Barry Buzan in "Time-lag Could Jeopardize Progress Toward Law of the Sea", International Perspectives, November/December, 1974.

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<sup>25</sup>ibid., p. 261.

<sup>26</sup>"The Law of the Sea", Department of State Bulletin, April 7, 1958. p. 578.

<sup>27</sup> "International Conference on The Law of the Sea", External Affairs, vol. 10, no. 1., January 1958. p. 25.

<sup>\*\*</sup>The information in this paragraph is derived from "The Deep Ocean Environment: US and International Policy", Department of State Bulletin, August 12, 1968.

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<sup>30</sup>Buzan, Barry, Seabed Politics. p. 61.

<sup>31</sup>Ibid.

<sup>\*\*\*</sup>This information on the national oceans policy of the United States is found in "U. S. Explains Proposal for International Decade of Ocean Exploration--Statement by Ambassador Wiggins", Department of State Bulletin, December 2, 1968 and "The Deep Ocean Environment: US and International Policy", Department of State Bulletin, August 12, 1968.

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<sup>35</sup>Buzan, Barry. Seabed Politics. p. 61.

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<sup>53</sup>Simmonds, Kenneth R., ed. New Directions in the Law of the Sea, U. 6. 1. (New York: Oceanic Publications, Inc, May 1987) p. 3.

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<sup>63</sup>"Draft UN Convention on the International Seabed Area: U. S. Working Paper Submitted to UN Seabeds Committee", Department of Bulletin, August 24, 1970. p. 212.

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